

Domestic law – International legal framework, Recent case law of ECtHR, Practical issues in impl. law on domestic violence

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Content

- Introduction
- 1. Culture and law
- 2. Protection from domestic violence.
Experience from Norway
- 3. Domestic violence in a context of protection
of human rights
- 4. Cooperation between institutions in the
area of domestic violence. Discussion



Introduction

- My previous work on legal issues
- Focus / underlying rationale
- Limitations and advantages
- Approach



1. Culture and law

Content

- Rule of law
- Culture
- Cultural relativism
- Law



Rule of law

“When persons access the courts, they are not merely seeking a resolution of their disputes. They are in pursuit of a broader notion of ‘justice’, which is located in some general societal consensus about what is fair, right or morally acceptable. To the extent that individual perceptions about rightness differ, our challenge is to demonstrate some standard of legitimacy that is grounded in something more substantial and credible than the caprice of the individual Judge hearing a case, and that attracts public trust and confidence. The objective of judicial training therefore is to locate, articulate, communicate and ultimately to apply those principles of rectitude to which our personal preferences, desires and emotions must be subordinated. We call it the rule of law.”



Culture I

(a) On culture

- What is culture?
 - Def. 1: An integrated system of learned behavior patterns which are characteristic of the members of a society, and are not the result of biological inheritance
 - Def. 2: A diverse set of activities characteristic of all human societies



Culture II

- Why is culture relevant to consider here?
 - Law is an integral part of culture
 - Law relates to other parts of culture
 - Law changes as culture changes
- Culture is universal and particularistic
 - It is *universal* because basic aspects of human life are similar or identical independent of culture
 - It is *particularistic* because it sustains kaleidoscopically different sets of values, institutions and behavior in different cultures



Culture III

- Culture lends itself to comparative analysis
 - Law and legal systems can be analyzed comparatively
- Culture and rationality
 - Viewed from the inside it is rational (*emic*)
 - Viewed from the outside it is not rational (*etic*)
- Culture changes
 - Causes for change are internal and external



Culture IV

- Key elements of culture
 - Ideology
 - Nationality
 - Ethnicity
 - Social class
 - Gender
- Culture is relative
 - It is particularistic and comparative, and its rationale is relative



Cultural relativism I

- Long history
 - Goes back to Herodotus
 - Developed by anthropologists
- The opposite term is ethnocentrism
 - One's own culture is the center of everything
 - Cultural relativism was in part a response to ethnocentrism, esp. as found in Western countries
 - Scientists (incl. anthropologists & lawyers) grow up in a particular culture, and are necessarily ethnocentric



Cultural relativism II

- Cultural relativism presents an outside view of our own culture
 - In this way we realize the extent to which our beliefs and activities are culture-bound
- Cultural relativism does not mean that ...
 - All cultures are both separate and equal
 - All value systems, however different, are equally valid



Cultural relativism III

- Universal Declaration of Human Rights
 - Transformation of cultural relativism into moral relativism: from a heuristic tool to a doctrine
 - Anthropologists paved the way
 - Key argument: the Declaration was prepared primarily by people from the West, and expressed values that were Western and not universal



Law I

- From custom to law, evolutionary perspective
- A definition of law
 - “A social norm is legal if its neglect or infraction is regularly met, in threat of in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting” (source: a legal anthropologist)
 - According to this definition many cultures may be deemed as law-less



Law II

- Anthropological discourse changed to examine the manifestations of law's societal function
- Functions of law:
 - To identify socially acceptable behavior for inclusion in culture
 - To allocate authority and who may legitimately apply force
 - To settle trouble cases
 - To redefine relationships as the concepts of life change



Law III

- Different schools of thought in anthropology, in which the study of law can be categorized
 - Prescriptive rules
 - Observable regularities
 - Instances of dispute
- Law is absolute and relative
 - It straddles a sometimes difficult balance between universalism on the one hand and particularism on the other hand



2. Protection from domestic violence: Norway

- Content
 - Fundamentals of Norway
 - Characteristics of Norway
 - Factors that influence the character and evolution of domestic violence
 - Factors that influence how the courts deal with domestic violence
 - Case law



2. Protection from domestic violence: Norway

- Context for understanding Norway better
- Fundamentals of Norway
 - *Nature & natural endowments.* Little agriculture. Very pronounced topography. Factors for explaining why no nobility and no serfdom
 - *Homogenous.* Areas of ethnicity and race, religion, social class, gender, economics
 - *Egalitarian.* Very few differences between citizens.



Fundamentals II

- Fundamentals of Norway
 - *Politics*. Social democratic governance model. Strongly consensus oriented
 - *Sami*. The ethnic group Sami. Traditionally reindeer nomads. Live mostly in the extreme northern region.
 - *Independence*. There is an age-old tradition for staying independent. From the beginning of history to the relation with EU



Characteristics I

- Characteristics of Norway
 - *Immigration*. High in relative terms. Leads to serious problems between immigrants and ethnic Norwegians
 - *International I*. Strong record on international development cooperation activities
 - *International II*. Active globally in supporting various human right activities
 - *Wealth*. Wealthy, as individuals and as country.



Characteristics II

- Characteristics of Norway
 - *Integration in EU.* Very strong and increasing, not in formal terms, but in practical terms.



Factors I

- Factors that influence the character and evolution of domestic violence
 - A less egalitarian society
 - A less homogenous society
 - Increase in social class differences
 - Increase in poverty
 - Increase in immigration



Factors II

- Factors that influence the character and evolution of domestic violence
 - Immigrants come from far-away and war-torn countries, have little education, are often scarred (incl. psychologically) by conflict and war, and have little capacity for integration in mainstream society



Factors III

- Factors that influence how the courts deal with domestic violence
 - A deep societal value that the purpose of the courts are to help and reform, not to deter and penalize
 - In cases where the accused are immigrants, a strong emphasis on understanding the cultural context
 - Supra-national considerations, esp. the EU



Factors IV

- Factors that influence how the courts deal with domestic violence
 - A deep societal value that the purpose of the courts are to help and reform, not to deter and penalize
 - In cases where the accused are immigrants, a strong emphasis on understanding the cultural context
 - Supra-national considerations, esp. the EU



Case law I

- Supreme Court, HR-2009-02021-S, Case no. 2009/983, criminal case, appeal against conviction
 - Concerns sentencing in a case of serious domestic violence
 - The fundamental question was whether to give independent weight at sentencing to the fact that the prosecution had pledged to lay down a specific criminal allegation, against the accused admitting guilt



Case law II

- Supreme Court, HR-2010-01426-A
 - Concerns sentencing in a case of serious domestic violence
 - The case concerns the question of whether the Penal Code, paragraph 219 about domestic violence, protects children who have witnessed physical and psychological abuse of the children's mother (A), and raises the question of redress in this connection



Case law III

- Low court sentence
 - A received 1 year and 8 months. In addition came high redress claims to three children
 - The defense argued that there is no law that addresses agreements between the State and the accused over sentencing. Two earlier Supreme Court decisions did not question such agreements



Case law IV

- A appealed to higher court
 - A appealed principally over the use of evidence in connection with the question of guilt, secondarily over the sentencing
 - A also petitioned for a retrial of the claims for damages
 - The court decided to try the appeal over use of evidence in connection with the question of guilt



Case law V

- A later changed her mind, so that the court only addressed sentencing. This was part of a deal between A and the State, where the latter indicated a sentence of 1 year and 4 months, with 11 months being conditional, and a probation of 3 years. It was a special condition that A should participate in discussions within a conflict council, and also take part in a project devoted to reconciliation, conditional upon the victims' acceptance.



Case law VI

- The Penal Code, paragraph 59, states that a clear admittance of guilt is to be taken into account when sentencing. However, it is a question whether this admittance of guilt should lead to a larger rebate than would normally follow from other case law
- Another factor consisted of details of the family relations. A came to Norway alone, and the children joined her several years later. They had not seen their mother for 10 years



Case law VII

- Another factor was the character and level of the mistreat of the children, which was exceptionally serious
- The Supreme court voted to not accept the appeal
 - The argument about A participating in a project for reconciliation was not accepted as the children had no interest in meeting with the mother



Case law VIII

- The Court argued that there has to be very special reasons for giving a rebate when admittance of guilt comes so late, and these are not present in this case
- Compared with earlier comparable cases a rebate of 1/5 of the total sentence was considered to be disproportionately high



3. Domestic violence & human rights

- Victims of domestic violence are primarily
 - Women
 - Children
 - But also men
- Broad categories of human rights violations
 - Physical, sexual and psychological abuse
 - Child custody
 - Housing discrimination and forced eviction



Types of violations II

- Female genital mutilation
- Trafficking
- Obstacle to recognizing domestic violence as a human rights issue
 - The belief that international human rights law did not apply to the private sphere
 - Human rights law governed the conduct of states. Domestic abuse was seen as lying outside the responsibility of states



Types of violations III

- Three ways in which domestic violence can be understood as a human rights violation
 - *Due diligence*. States are responsible for “private” acts if they fail to fulfill their duty to prevent and punish such acts
 - *Equal protection*. States are required under international law to provide all citizens with equal protection of the law
 - *Torture*. It is increasingly recognized that domestic violence is a form of torture



Types of violations IV

- Physical, sexual and psychological abuse
 - Under intl. law, domestic violence is treated as (1) discrimination against women and a violation of women's human rights, (2) torture in the private sphere and (3) a violation of the right to life / quality of life and right to family life



Types of violations V

- Child custody
 - Relevant instruments: Convention on the Right of the Child, Convention on the Elimination of All Forms of Discrimination Against Women, Intl. Covenant on Economic, Social and Cultural Rights, Intl. Covenant on Civil and Political Rights, Universal Declaration of Human Rights



Types of violations VI

- Housing discrimination and forced eviction
 - Domestic violence a main cause for homelessness among women
 - Relevant instruments: Intl. Covenant on Civil and Political Rights



Types of violations VII

- Female genital mutilation
 - Relevant instruments: Universal Declaration of Human Rights, Convention for the Elimination of All forms of Discrimination Against Women, The Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment



Types of violations VIII

- Trafficking
 - Relevant instruments: UN Convention Against Transnational Organized Crime, Convention on the Elimination of Discrimination Against Women



4. Cooperation on domestic violence

- There is too little cooperation
- The legal profession and the courts are *of* society, but not necessarily *in* society. They should be more open
- There are three sectors in society: public sector, private sector and civil society.
 - While it can be discussed what or how the private sector could contribute, the other two certainly needs to collaborate closer



Cooperation II

- Both public sector and civil society consists or large numbers of different stakeholders
 - These could both contribute to as well as learn from the legal profession



Cooperation III

- Case 1: Norway, Agder region
 - The two counties in this region have recently mandated, in official regulations, the preparation of a draft plan, the so-called “LIM-planen” (Equality, Diversity, Inclusion)
 - The plan addresses equality for all citizens, and along a number of variables, incl. gender, ethnicity, age, physical disability, religion, sexual orientation and social background
 - Gender and ethnicity are prioritized



Cooperation IV

- Case 2: Bangladesh
 - News Network, a news organization that emphasizes alternative (not mainstream) news, with support from the Czech Republic Embassy, presently organizes a series of workshops on the topic “Sensitization workshop to combat gender based violence”. The participants are journalists and media persons



Cooperation V

- Case 2: Bangladesh (cont'd)



Cooperation VI

- Case 2: Bulgaria
 - I have above addressed legal systems, the cultural relativism of cultures, and how the majority (which the legal profession recruits its members from) should address minorities
 - Bulgaria has its share of such minorities. Roma is one such group.
 - Roma try to avoid bringing issues for the courts, specifically those involving domestic violence



Cooperation VII

- Case 2: Bulgaria (cont'd)
 - I am informed by Roma that, when they approach the courts, they mostly feel they are fairly treated
 - In the specific case of marriage of minors, an issue Roma feels as strongly about as the legal system does, I understand that the courts view this with lenience, and accept marriage between minors.
 - This is commendable!



Cooperation VIII

- Questions for discussions
 - Is everything ok, then, when it comes to how Roma are treated before a court?
 - How can the legal profession open up and communicate more with other societal stakeholders?
 - What - and how - can the legal profession learn from what is done internationally?

