

Besprechungen

KATHRIN MELLECH: *Die Rezeption der EMRK sowie der Urteile des EGMR in der französischen und deutschen Rechtsprechung*, Jus Internationale et Europaeum Bd. 68, Mohr Siebeck, Tübingen, 2012, XVII, 270 S.

The reception of the European Convention on Human Rights (ECHR), as well as judgements from the European Court of Human Rights (ECtHR), by national legal systems in general and national courts in particular is a topic occupying an increasing number of legal scholars across Europe. The subject is important both from an international point of view, considering the ever-increasing case-load of the ECtHR in the light of its intended subsidiarity, and from a national point of view, as Contracting States strive to fulfil their obligations under the Convention. The States' desire to avoid a sentencing by the ECtHR is an important incentive in their efforts to secure human rights.

Kathrin Mellech adds something new to this debate by contrasting the German system with the French, thus highlighting strengths and weaknesses in both systems. Taking into account the considerable amount of recent writings on this topic by German authors, her primary objective is not simply to re-assess materials that other authors have analysed extensively before her, but rather to acquaint her German readers with the French system. It is not her goal to conduct an independent analysis of German law in this field, and as a consequence her account of German law may at times seem somewhat superficial, but at the same time, it fulfills its purpose as a standard for comparison, furthering her readers' understanding of the foreign French system by contrasting it with the familiar German. The main part of the book is written in German, but in addition, the thesis also contains a 70-page résumé in French, thus serving also to acquaint the French with the German system. This report is based on the 217-page German main text.

Kathrin Mellech initially deals with the reception of the ECHR in the two countries, elegantly demonstrating that although the starting point of the French monistic legal system is diametrically opposite from that of the dualistic German, the practical differences are limited. Considering that *Mellech's* purpose is to acquaint German readers with an unfamiliar system, this reader would have preferred a brief introduction to the French court system, the better to understand the practical legal ramifications of the different courts' point of view regarding for example the self-executing character of the Convention's provisions. However the initial confusion is mostly cleared up in the comparative chapter where similarities and differences between the French and German systems are highlighted. The analysis of case-law adds depth to the analysis, as it demonstrates how the formal standing of the Convention is not necessarily indicative of its actual influence over national law. Even those courts which adamantly stress their independence from supra-national tribunals seldom deviate from the Convention guarantees.

Mellech gives a succinct and to-the-point overview of the current standing of the ECHR in German and French law, and also points out how it may indirectly achieve a higher status in Germany, through interpretation of ordinary Acts of Parliament in conformity with the Basic Law. Considering, however, that there seems to be some discrepancy between theory and practice as far as the so-called

Wortlautgrenze is concerned – namely the idea that interpretation of a statute must observe the limits of the wording – a somewhat more detailed discussion would have been interesting, especially in the light of the extensive case-law analysis in the second chapter of the book.

If the first part of the book was at times a little superficial, this cannot be said of the second chapter, which deals with the national courts' reception of judgements from the ECtHR. This demonstrates the interplay of international and national law, and how the courts are at times stuck between a rock and a hard place in having to observe the limitations on their competences as laid down in their national law, while at the same time having to avoid breaching their country's obligations under international law.

The analysis starts with a closer examination of the Parties' obligations under the Convention, observing that although the Convention does not directly place obligations upon the national courts, the Contracting States' obligations under international law are nevertheless an important standard against which to measure the efforts made towards the protection of human rights on the national level. Specifically, the question is whether the judgements of the ECtHR are binding on the Contracting States. In accordance with the traditional German approach to case law, the author sees this as an either-or situation rather than a matter of degrees, and brings a good overview regarding the binding effect of the judgements within the framework of Article 46 of the Convention – in other words, the binding nature of the judgements on the parties to a case, and what obligations a judgement places upon the State party. She also includes an informative assessment of what types of obligations flow from the judgements, actualised in Germany by the *Görgülü* case from 2004.

As regards the effects of the judgements outside the scope of the adjudicated case, the author takes the view apparently still favoured by the majority of her German colleagues, briefly stating that outside the scope of the concrete case, the judgements have no binding effect under international law. However, like an increasing number of authors also within Germany, she later goes on to discuss whether the ECtHR's interpretation of the Convention may nevertheless have a binding effect also upon those Member States which were not party to the case. This reader would have expected this assessment to be founded primarily on an interpretation of the Convention text itself, and it would therefore have made sense to present the principles of interpretation before this assessment rather than after. Even so, the principles of interpretation are to some extent *de facto* relied upon, and the author also points out some interesting arguments, illustrating the importance and value of comparative analysis in this field. From a Norwegian point of view, however, this reader cannot help but question the way the absence of a *Vorabentscheidungsverfahren* – the possibility for national courts to petition the ECtHR for a statement regarding an issue of interpretation in a case currently before them – is taken as confirmation of the lack of a binding effect of the ECtHR's interpretation of the Convention. Norwegian law knows no such procedure, but this does not prevent our Supreme Court case-law from having a high degree of normative influence on the law in subsequent cases. While on the one hand the author's adoption of a French and German perspective also in the interpretation of the Convention on the international level may therefore be construed as somewhat narrow, it can also be said to illustrate the importance, and at the same time the challenges, of a comparative approach to research in this field, perhaps especially as the issue of the ECtHR case-law is concerned. A broader comparative analysis of the international issues would be highly interesting, but considering the primary purpose of the present work, it would also be asking too much.

Taking the view that the judgements of the ECtHR are not binding on the parties to the Convention outside the scope of the adjudicated case under international law, also not with regard to the ECtHR's interpretation of the Convention, the author proceeds to analyse the national courts' approach to the case-law. In so doing, she recognises the important caveat that although the national courts are not bound by the ECtHR's interpretation under international law, a binding effect may nevertheless follow from national law, and the differing competences of the different national courts mean that the situation is not necessarily the same for all the national courts. She therefore analyses the practice of each national court separately, wisely limiting the analysis to the higher courts for the sake of overview.

For both Germany and France, *Mellech* demonstrates the practical challenges faced by the Constitutional Courts – Bundesverfassungsgericht and Conseil Constitutionnel – who have to deal with two largely overlapping but not always identical sets of rights, one constitutional and one not, but at the same time part of international law. In consequence, an isolated application of the lex superior national provisions may lead to a breach of the countries' obligations under international law and possibly a finding of a violation by the Court in Strasbourg, a distinctly undesirable outcome. In a thorough examination of the application of specific rights, *Mellech* demonstrates the different strategies the courts adopt in order to mitigate or even at times circumvent this problem while at the same time protecting their independence and the constitutional order of their country, in particular the separation of powers. As a background, the author includes a brief description of each court's competence related to the Convention guarantees, as well as a description of the types of cases they deal with. The potential for remedying breaches of the Convention by finding the state liable is also discussed, again demonstrating the value of comparative research by showing how the German approach, requiring fault on the part of the parliamentary representatives, deprive the German courts of a tool which could otherwise be used to remedy the situation where the courts are obliged to apply a norm which is not in keeping with the ECHR.

The comparative part is particularly informative, highlighting how differences in the court system, both due to the courts' competences and simply differences in policy choices, lead to a different reception of the ECtHR judgements. Considering the ever-increasing case-load of the ECtHR and the need to alleviate its burden, this reader feels that the reasons behind these differences deserve a more thorough analysis, with a view to discovering how obstacles to reception may be removed, as well as the possible consequences if they are. However, in the light of the primary objective of the present work, the author cannot be faulted for limiting this type of in-depth study. The case-law analysis forms a solid basis for further study into this field, and provides the reader with a good understanding of the different approaches chosen by the high courts in the two countries.

To summarize, the book amply fulfils its purpose in acquainting its German readers with the French reception of the ECHR and the judgements of the ECtHR, although it is at times not readily accessible to those readers who have little or no previous knowledge of the French legal system. Nevertheless, it adds an interesting perspective to the on-going discussion of how national legal systems, and national courts in particular, should deal with the influx of international sources. Although the author allegedly did not set out to assess either system with a view to identifying potentials for improvement, the way she contrasts one system with the other elegantly highlights strengths and weaknesses within each system, and serves as a good starting point for those who do consider reforming their national system(s).