Book Review

The „pseudo doctrine“ – a pseudo problem?

On the (ir-)relevance of the doctrine of self-executing treaties for the domestic effect of international law

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The question of the “self-executingness” or “direct applicability” of international law is in fact a question of domestic law, but still almost all textbooks on international law address it. The reason for this lies in the treatment of “self-executingness” by many domestic courts as a precondition for the application of international law in their proceedings. In other words, the doctrine is said to determine to a great extent the effects international law has in the domestic sphere. This is also the starting point of the book *Das Scheininstitut der unmittelbaren Anwendbarkeit*, which could be translated as “The question of self-executingness as pseudo-doctrine”. The author Jakob Lohmann, using the example of the right to higher education under Art. 13 of the International Covenant on Economic, Social and Cultural Rights (CESCR), sets out to deconstruct the doctrine of self-executing norms. Brought to the point, the bold argument of the book is that the doctrine has no independent legal function and, therefore, should be abolished.

The author of this very concise and sophisticated, even though at times a bit formalistic, book proceeds in three main steps: The starting point is that a legal norm that is in no forum directly applicable in fact is no norm. In a first step, he thus carefully analyzes whether the doctrine of direct applicability – which he understands as a synonym of self-executingness and defines as the question of whether domestic actors, especially courts, can use a norm directly as a basis for their decision-making (p. 58) – nonetheless fulfils an independent legal function. His conclusion is that there exists no (legal) function that would be important enough to uphold the doctrine. In a second step, he excludes negative side-effects of a possible abolishment of the doctrine – a logical consequence of the finding that the doctrine has no actual function – to finally illustrate the result of this assessment for Art. 13 CESCR. The book concludes that without the question of direct applicability, one of the biggest weaknesses of socio-economic rights could be overcome. Courts would have to deal with the socio-economic rights in substance instead of being “distracted” by a “fake” formal question. In fact, the reason the author deconstructs the doctrine is precisely because of his interest in the obligations flowing from the right to higher education, as he writes in the introduction. Using the examples of Germany and Chile, two states with very different systems of education, his original aim was to show how the application of Art. 13 to different contexts leads to very different obligations, the reason being the progressive nature of this norm which enshrines different duties of conduct. However, because of the lack of direct applicability in Germany and for a long time also in Chile, the actual obligations remain only poorly defined for the two countries. It is only in the last part of the study, and thus after having “overcome” the more theoretical problem of the lack of direct applicability, that the author can unpack the different obligations flowing from this fascinating norm for the two states.

A misleading question indeed

I agree that the doctrine of self-executing treaties is “confusing” (p. 24) and a “misconstruct” (p. 27) and of course the author is not the first one to criticize it. It is well-known that the doctrine often serves as an “avoidance technique”, i.e. as a pretext for domestic courts not to apply international law, and that the question thus has a political note. Nollkaemper has shown how courts use the doctrine both as a “sword” and a “shield”, i.e. to give far-reaching effects to international law in the domestic order, but also to shield the domestic order from international law. Others have called the doctrine misleading and have claimed that behind the surface of the apparently technical question lie much more fundamental and in fact constitutional questions (cf. Peters, Chapter 16; von Bogdandy).

Even though others have thus addressed the question before, the great merit of the book lies in the systematic deconstruction of the doctrine of self-executing norms. It indeed seems to be the first time that someone really goes all the way and logically penetrates the question and possible consequences. This deconstruction is well done and convincing, even though one might raise the question whether the definition of law the analysis is based on is suiting when it comes to international law. The author operates with a narrow, court-centered definition, at the heart of which lie consequences and sanctions in cases of norm breaches. Indeed, most of the examples he uses stem from domestic (German) law. But this shall not be the focus here. The point I would rather like to make is that, even though I share the finding of the book that the doctrine of self-executingness is of no great value, I think that the "Scheininstitut" is somewhat a "Scheinproblem", which means a "pseudo-problem", to phrase it a bit provocatively. In fact, in practice it seems that the question is not anymore of great relevance and that the real problems lie elsewhere.

In the end, the author and I probably agree – he highlights that the actual problems can be dealt with under other headings. Two of the problems often dealt with under the doctrine, namely the question of the sufficient precision or the political character of a norm, in the eyes of the author (and again following his narrow concept of a norm) in fact concern the question whether or not a norm exists at all and whether this norm has lawfully become part of a legal system (pp. 142-149). The third question Lohmann identifies and to which he dedicates a whole chapter (E.) is: who is entitled and who obligated by a norm? All in all, even though I do not agree with all the details of the analysis and rather follow the terminology of Anne Peters who conceptualizes the main underlying conflict as one of separations of power (see again here, Chapter 16), in the end this leads to the same result, namely that the doctrine of direct applicability as such is of no great value. Where I disagree with the author is when it comes to the consequences of this finding. The point I would like to make is that not much will be won by simply abolishing the legal institute.

The right question?

But let me explain. In my own thesis which will be published this year, I also examined the question of self-executingness, but from a more empirical perspective. I looked at how domestic courts in practice deal with the question. I did this not with regard to the already much researched field of treaty law, but with regard to international judgments and, more precisely, the judgments of two of the most active international courts, the European Court of Human Rights (ECtHR) and the Interamerican Court of Human Rights (IACtHR). The reasons to focus on international judgments was not only that in times of global governance they play an important role and that this had not been systematically examined before, but also because one of my core hypotheses was that in this constellation, domestic courts would find it harder to "shrug off" the question of self-executingness based on purely formal reasons like the vagueness or the lack of precision of a norm. The reason of course is that international judgements which always deal with concrete situations are per definition more precise and less vague than treaty law. My guess was that in these situations courts would have to deal much more directly with the substantial issues at stake.

And one of the core findings of my analysis indeed is that the traditional formal criteria courts use when dealing with the self-executingness of treaty law hardly play any role when it comes to international judgements. What seems to be decisive for many courts in their decision whether or not to give effect to international judgments are *substantive* questions such as the gravity of the human rights violations or the question whether they are the "last resort" for the concerned individuals. Many courts thus choose a flexible and at times even pragmatic approach, balancing the interests at stake and deciding on a case-by-case basis (see for a condensed version of this argument of the thesis here). This clearly suggests that the doctrine in practice plays only a marginal role, at least with regard to international judgments.

What consequences beyond Art. 13 CESCR?

I thus agree with Lohmann that not much would be lost if we abolish the doctrine, but at the same time I think that not much would be won, either. But let me elaborate a bit more. I agree that courts would probably have to deal more substantially with international law when they cannot "hide" behind the doctrine. However, even if the result would indeed be a greater effectiveness of socio-economic rights or international law more broadly, I wonder whether as such this is a goal worth pursuing. Sure, the effectiveness of the CESCR is probably improvable, and it is probably equally true that the doctrine is particularly often invoked regarding socio-economic rights. As the author shows in the last part of the book, to deal with the different layers of the obligations flowing from Art. 13 leads to a "de-mystification" of the CESCR (p. 252). His sober

yet convincing conclusion is that the application of Art. 13 CESCR would not have the far-reaching consequences many seem to fear.

However, what does this mean for other fields of international law? From his very differentiated analysis on Art. 13 CESCR, Lohmann draws more general conclusions. But what about areas of international law that are already quite effective? In my view, should the suggested solution imply a strictly monist view of the relationship between domestic and international law with international law at the top of the hierarchy (the author does not elaborate on the relationship between direct effect and the question of which norms prevail in cases of conflict), I do not think that this is normatively desirable. In fact, there seems to be broad agreement today that a monist model in the sense of an unconditional precedence of international law over domestic law is neither a feasible nor a desirable solution to order today's complex and multilayered legal reality (see e.g. Krisch or Berman's seminal work).

Domestic and international law – a relationship bound to be complex

Moreover, I submit that even if we manage to "get rid" of the question of direct applicability, it is likely that courts will find other reasons to avoid the application of international law. More recently, courts increasingly seem to rely on fundamental principles of domestic (constitutional) law to justify their non-implementation of international law (see again here, where I – like others –argue that this does not necessarily mean a "backlash" against international law, but highlights the complexity of the interplay between domestic and international law in times of global governance). What this shows is that in times of much-increased activity of international institutions, certain tensions and difficulties regarding the interplay between different legal orders are inevitable, no matter whether they are dealt with under the doctrine of self-executing treaties or under possibly newly emerging – and even more problematic – doctrines such as the non-implementation of international law based on fundamental constitutional principles (see on this here and here). Thus, even if the view that the doctrine of self-executing norms is irrelevant should indeed prevail, it is certain that the relationship between domestic and international law will remain a complex – and fascinating – topic.

Jakob Lohmann, Das Scheininstitut der unmittelbaren Anwendbarkeit. Eine Untersuchung anhand des Rechts auf tertiäre Bildung nach Art. 13 IPwskR (Duncker & Humblot 2019).

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