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The implementation of international law in the national legal order : a legislative perspective

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Summary in Dutch

De implementatie van internationaal recht in de nationale rechtsorde: een wetgevingsperspectief

SAMENVATTING

Het vertrekpunt van dit proefschrift, getiteld 'De implementatie van internationaal recht in de nationale rechtsorde: een wetgevingsperspectief', is dat internationaal recht voor zijn verwezenlijking in belangrijke mate afhankelijk is van de organen van afzonderlijke staten en dat de rol van de wetgevende organen, zeker in vergelijking met de rol van rechters, weinig aandacht heeft gekregen in de literatuur. Het proefschrift richt zich daarom specifiek op de rol van de nationale wetgever bij de implementatie van internationaal recht en geeft antwoord op de vraag hoe implementatiewetgeving onder internationaal recht is gereguleerd en in hoeverre die regulering adequaat is. 'Implementatie' wordt in deze studie begrepen als de handeling waarmee een internationaalrechtelijke norm wordt geëffectueerd in de nationale rechtsorde. Met 'nationale wetgever' wordt bedoeld op het orgaan van de staat dat krachtens nationaal recht de bevoegdheid heeft om wetgeving vast te stellen.

Het antwoord op de hoofdvraag valt uiteen in twee onderdelen: een beschrijvende analyse van het bestaande, toepasselijke internationaal recht in deel II en een normatieve analyse van dat recht in deel III.

Deel I, getiteld 'De implementatie van internationaal recht in de nationale rechtsorde', gaat in op de vraag waarom nationale wetgeving ter uitvoering van internationaal recht nodig is en uit welke rechtsbronnen verplichtingen voor staten voortvloeien om in de nationale rechtsorde dergelijke wetgeving vast te stellen. De eerste vraag, die centraal staat in hoofdstuk 2, raakt aan de verhouding tussen de internationale rechtsorde en de nationale rechtsorde. Deze verhouding moet naar de huidige stand van het recht bovenal als 'dualistisch' worden aangemerkt. Dat betekent dat de internationale rechtsorde en de nationale rechtsorde(s) als aparte rechts-sferen moeten worden beschouwd.

Voor dit proefschrift is dat relevant in twee situaties. Ten eerste kan de situatie zich voordoen waarin een internationaalrechtelijk regime de staat een verplichting oplegt om op nationaal niveau wetgeving vast te stellen teneinde de in het regime geformuleerde doelen te verwezenlijken. Een voorbeeld hiervan is de verplichting, opgenomen in artikel 12, eerste lid, van het Afrikaans Handvest over de Waarden en Beginselen voor Openbare Dienst en Openbaar Bestuur, om wetgeving vast te stellen waarmee nationale anticorruptieautoriteiten worden opgericht. Dergelijke wetgeving wordt in het proefschrift 'implementatiewetgeving in enge zin' genoemd.

Ten tweede kan de situatie zich voordoen dat een internationale rechtsnorm niet doorwerkt in een nationale rechtsorde, ook al is zij zodanig geformuleerd dat zij in theorie geschikt zou zijn voor rechtstreekse toepassing in die rechtsorde. Een voorbeeld hiervan is het recht op leven, verankerd in artikel 2 van het Europees Verdrag tot bescherming van de Rechten van de Mens en de Fundamentele Vrijheden (EVRM), dat aan een individu wordt toegekend. De mate waarin internationaal recht doorwerkt in de nationale rechtsorde, hangt namelijk af van nationaal constitutioneel recht. Dit blijkt onder andere uit het feit dat een internationale rechtsnorm niet als 'recht' in de zin van een nationale rechtsorde kan worden aangemerkt totdat die norm op grond van nationaal recht die status verwerft, hetgeen op uiteenlopende manieren en onder verschillende voorwaarden gebeurt. Dergelijke wetgeving wordt in het proefschrift 'incorporatiewetgeving' genoemd.

Deze stand van zaken verklaart waarom implementatiewetgeving in ruime zin (hetgeen de hierboven omschreven implementatiewetgeving in enge zin en incorporatiewetgeving omvat) nodig is: internationaal recht is niet bij machte om eigenstandig, dus zonder dat nationaal constitutioneel recht hierin voorziet, rechtsposities binnen nationale rechtsordes te bepalen. Overigens is het vervolg van het proefschrift beperkt tot implementatiewetgeving in enge zin; incorporatiewetgeving blijft verder buiten beschouwing.

In hoofdstuk 3 wordt geïnventariseerd uit welke internationale rechtsbronnen verplichtingen voor staten kunnen voortvloeien om op nationaal niveau implementatiewetgeving te kunnen vaststellen. Daarbij is gekeken naar drie rechtsbronnen in het bijzonder: verdragsrecht, gewoonterecht en bindende besluiten van internationale organisaties. Verplichtingen voor staten om implementatiewetgeving vast te stellen, zijn meestal onderdeel van verdragen. Dergelijke verdragen kunnen betrekking hebben op zeer uiteenlopende onderwerpen. Er zijn ook aanwijzingen dat in zeer uitzonderlijke situaties gewoonterecht een verplichting kan bevatten om op nationaal niveau wetgeving aan te nemen. Het (enige bekende) voorbeeld dat in hoofdstuk 3 is besproken, heeft betrekking op het verbod op foltering en het verbod op genocide. Deze verboden omvatten ook, zo lijkt het Joegoslaviëtribunaal te suggereren, een verplichting voor staten om wetgeving aan te nemen ter bestraffing van foltering en genocide. Daarnaast kunnen bindende besluiten van internationale organisaties de plicht opleggen aan staten om op nationaal niveau wetgeving vast te stellen. Voorbeelden zijn enkele resoluties van de VN-Veiligheidsraad over terrorisme en over massavernietigingswapens, de Internationale Gezondheidsregeling van de Wereldgezondheidsorganisatie (ook al bestaat er een mogelijkheid tot een *opt out*), de 'technische standaarden' van de Internationale Organisatie voor Burgerluchtvaart en de Wereldmeteorologieorganisatie en de richtlijnen en verordeningen die worden vastgesteld in het kader van de Europese Unie (EU).

Internationaalrechtelijke normen kunnen als volgt worden ingedeeld. Er zijn normen die implementatie in de nationale rechtsorde behoeven en normen die niet hoeven te worden geïmplementeerd in de nationale

rechtsorde (zoals een verdrag tot vorming van een bondgenootschap tussen staten). De eerste categorie kan in drie groepen worden onderverdeeld: normen die moeten worden geïmplementeerd door de uitvoerende macht, normen die moeten worden geïmplementeerd door de rechtsprekende macht en normen die moeten worden geïmplementeerd door de wetgevende macht.

In dit proefschrift staat de laatstgenoemde categorie centraal, die op zijn beurt kan worden onderverdeeld in normen die een uitdrukkelijke verplichting tot de vaststelling van implementatiewetgeving bevatten en normen die dat impliciet doen. Het verschil tussen deze twee (sub)categorieën is dat uit de tekst van een norm die onder de laatstgenoemde subcategorie valt, niet uitdrukkelijk wordt verwezen naar het vaststellen van wetgeving, maar naar aanverwante begrippen, zoals 'maatregelen' of 'strategieën'. Indien de redactie van de internationaalrechtelijke norm de mogelijkheid openlaat dat ook de uitvoerende macht of de rechtsprekende macht zorg draagt voor de implementatie ervan op het nationale niveau, zal nationaal recht doorslaggevend zijn. Met andere woorden, dan bepaalt nationaal (constitutioneel) recht welke van de staatsorganen uitvoering moet geven aan de implementatieverplichting.

In deel II wordt geïnterpreteerd hoe implementatiewetgeving onder huidig internationaal recht is gereguleerd, in het bijzonder in hoeverre dat recht wetgevingsstandaarden bevat. Met 'wetgevingsstandaard' wordt bedoeld op elk voorgeschreven materiële of formele kenmerk van nationale implementatiewetgeving of van de nationale implementatiewetgevingsprocedure. In dit deel wordt betoogd dat er geen wetgevingsstandaarden bestaan onder *algemeen* internationaal recht. Onder algemeen internationaal recht geldt als uitgangspunt dat staten verplicht zijn om op nationaal niveau de nodige maatregelen te nemen om te voldoen aan hun internationaalrechtelijke verplichtingen; hoe zij echter aan die verplichting voldoen, is aan de betreffende staat zelf om te bepalen. Wetgevingsstandaarden kunnen daarentegen wel worden waargenomen onder *bijzondere* internationaalrechtelijke regimes. In deel II worden daartoe twee regimes uit elk van de volgende rechtsgebieden geanalyseerd: internationale mensenrechten, het recht van de EU, internationaal strafrecht, internationaal gezondheidsrecht, internationaal milieurecht en internationaal arbeidsrecht (hoofdstukken 4 tot en met 9).

Op basis van de in deel II opgenomen inventarisatie kan de wetgevingsstandaard 'doeltreffendheid' als meest voorkomende wetgevingsstandaard worden aangemerkt. Andere wetgevingsstandaarden met een meer specifiek karakter hebben betrekking op de consistentie met ander toepasselijk recht (waaronder het verbod op discriminatie), het vereiste om belanghebbenden te consulteren bij het opstellen van implementatiewetgeving, het verstrekken van informatie over de vast te stellen implementatiewetgeving aan de doelgroep, het toezicht op de naleving van de implementatiewetgeving, de handhaving, rechtsbescherming en evaluatie van de implementatiewetgeving. Daarnaast zijn er wetgevingsstandaarden die betrekking

hebben op formele aspecten van nationale implementatiewetgeving ter bescherming van de rechtszekerheid.

De in deel II opgenomen analyse laat zien dat de praktijk ten aanzien van de opneming van wetgevingsstandaarden in internationaalrechtelijke regimes gefragmenteerd is: waar sommige regimes in grote mate de kenmerken voorschrijven waaraan nationale implementatiewetgeving moet voldoen, laten andere regimes veel ruimte aan de wetgevende organen van staten om de nationale implementatiewetgeving en het daarbij horende wetgevingsproces vorm te geven. Ook *binnen* regimes bestaan verschillen tussen de toepassing van wetgevingsstandaarden bij de vaststelling van implementatiewetgeving ter uitvoering van dat regime; wetgevingsstandaarden worden niet altijd van toepassing geacht op het betreffende regime als geheel, maar soms ook slechts op bepaalde delen van dat regime. Bovendien bestaat er ook een uiteenlopende praktijk met betrekking tot het bindende karakter van de wetgevingsstandaarden: terwijl sommige wetgevingsstandaarden een duidelijke basis hebben in het bindende juridische instrument, zijn andere opgenomen in niet-bindende documenten zoals implementatierichtlijnen, implementatiehandboeken etc.

In deel III worden de inhoud en reikwijdte van deze gemeenschappelijke kenmerken van implementatiewetgeving, oftewel de waargenomen wetgevingsstandaarden, verder uitgewerkt. Daarbij blijkt onder meer dat de wetgevingsstandaard 'doeltreffendheid' zich onder internationaal recht in verschillende formuleringen manifesteert. Daarnaast moet niet alleen de implementatiewetgeving zelf doeltreffend zijn, maar ook de toepassing ervan in de praktijk, althans onder het EVRM en het recht van de EU. Om te bepalen hoe de nationale wetgever op 'doeltreffende' wijze uitvoering kan geven aan een internationale verplichting tot de vaststelling van implementatiewetgeving, zal de wetgever de onderliggende verplichting moeten interpreteren. Ook daarbij speelt het vereiste van 'doeltreffendheid' een rol; het moet worden beschouwd als integraal onderdeel van de interpretatie van verdragsbepalingen 'in het licht van het voorwerp en het doel' van internationale verplichtingen, zoals is voorgeschreven in het Weens Verdrag inzake Verdragenrecht en de relevante jurisprudentie van het Internationaal Gerechtshof.

'Doeltreffendheid' is niet alleen de meest voorkomende wetgevingsstandaard, maar ook de overkoepelende wetgevingsstandaard. Er is met andere woorden sprake van een zekere hiërarchie tussen wetgevingsstandaarden. Deze hiërarchie kan worden opgemaakt uit de internationaalrechtelijke praktijk, waarbij de naleving van de 'ondergeschikte' wetgevingsstandaarden niet zelden als middel wordt gezien om de doeltreffendheid van het regime als geheel te bewerkstelligen.

Eén van die wetgevingsstandaarden is de standaard van rechtszekerheid, die van toepassing kan worden geacht op nationale implementatiewetgeving ter uitvoering van het recht van de EU en van de positieve verplichtingen onder het EVRM. Deze wetgevingsstandaard houdt in dat nationale implementatiewetgeving duidelijk en nauwkeurig moet zijn

geformuleerd. Daarnaast moet de betreffende wetgeving toegankelijk en voorzienbaar zijn, zodat individuen zich kunnen informeren over de regels die op hen van toepassing zijn en over de juridische gevolgen van hun handelen. Een andere wetgevingsstandaard die kan worden afgeleid uit de in deel II besproken internationaalrechtelijke regimes is het vereiste van consistentie met toepasselijk nationaal of internationaal recht. Dit vereiste houdt in dat nationale implementatiewetgeving niet strijdig mag zijn met reeds bestaande wet- en regelgeving, waaronder ook het verbod op discriminatie kan worden begrepen. Hiermee wordt enerzijds de doeltreffendheid van het regime beschermd, omdat naleving van dit vereiste voorkomt dat nationale implementatiewetgeving kan worden vernietigd wegens strijd met nationaal recht van een hogere rangorde. Anderzijds kan deze wetgevingsstandaard worden beschouwd als een bescherming van de soevereiniteit van staten, omdat het tot gevolg heeft dat het internationaalrechtelijke regime geen gevolgen heeft voor reeds bestaande nationale wet- en regelgeving. Soms bevatten internationaalrechtelijke regimes ook verplichtingen om bij de vaststelling van nationale implementatiewetgeving reeds bestaande *internationale* normen in acht te nemen. Voorts kan een wetgevingsstandaard worden waargenomen die de nationale wetgever verplicht om belanghebbenden te consulteren bij de opstelling van nationale implementatiewetgeving. Dit heeft tot doel het bevorderen van de steun voor en de kwaliteit van de betreffende wet. Weer een andere wetgevingsstandaard benadrukt het belang van de verstrekking van informatie over de vast te stellen of vastgestelde nationale implementatiewetgeving. De informatie moet in het bijzonder worden verstrekt aan de doelgroepen van deze wetgeving. De wetgevingsstandaard die verplicht tot het houden van toezicht op de naleving van nationale implementatiewetgeving, die onder enkele van de in deel II besproken regimes kan worden gevonden, omvat de instelling van een toezichtsmechanisme op nationaal niveau. Onder het Maritiem Arbeidsverdrag houdt deze wetgevingsstandaard onder meer in dat inspectie-organisaties de nodige expertise moeten bezitten en onafhankelijk moeten zijn. Bovendien moeten de inspecteurs bekleed zijn met de benodigde bevoegdheden om hun toezichttaak goed te kunnen uitoefenen. Wanneer wordt vastgesteld dat de toepasselijke nationale implementatiewetgeving is overtreden, schrijven meerdere internationaalrechtelijke regimes voor dat sancties moeten worden opgelegd. Dit omvat de verplichting voor staten om de bevoegde autoriteiten aan te wijzen en te voorzien in de nodige wettelijke grondslagen voor de oplegging van handhavingsmaatregelen. Vervolgens moeten staten de mogelijke handhavingsmaatregelen ook daadwerkelijk gebruiken. Ook kan onder enkele internationaalrechtelijke regimes een wetgevingsstandaard worden waargenomen die staten verplicht om rechtsmiddelen open te stellen voor individuen, zodat zij hun op grond van nationale implementatiewetgeving verkregen rechten ook daadwerkelijk kunnen afdwingen. Als laatste wetgevingsstandaard kan een verplichting voor staten om nationale implementatiewetgeving *ex post* te evalueren worden genoemd. Hiermee kan niet alleen worden nagegaan

of de implementatiewetgeving in de betreffende staat overeenstemt met de vereisten van het internationaalrechtelijke regime, maar ook worden vastgesteld of de nationale implementatiewetgeving kan worden verbeterd.

Vervolgens wordt beoordeeld in hoeverre die gemeenschappelijke kenmerken leiden tot een regulering van implementatiewetgeving die als 'adequaat' kan worden aangemerkt. Om dit begrip te operationaliseren, wordt het begrepen als 'in overeenstemming met de vereisten van goede wetgeving'. Daartoe bevat hoofdstuk 11 een bespreking van het wetgevingskwaliteitsbeleid in Nederland, het Verenigd Koninkrijk, de EU en de Organisatie voor Economische Samenwerking en Ontwikkeling (OESO). Hoewel hun wetgevingskwaliteitsbeleid van elkaar verschilt, bestaat duidelijke overeenstemming in de wetgevingsstandaarden die ervan deel uit maken en die als vereisten voor goede wetgeving worden beschouwd.

Voortbouwend op de vier besproken voorbeelden van wetgevingskwaliteitsbeleid wordt in hoofdstuk 11 een definitie voorgesteld van 'goede implementatiewetgeving', waarbij het vertrekpunt is dat de kwaliteit van een specifieke wet uitsluitend kan worden beoordeeld in het licht van de *functie* van die wet: het vermogen van een nationale wet om, met het oog op de functie of functies van die wet, de doelstelling of doelstellingen die zijn neergelegd in het internationale instrument te behalen. De toepassing en de naleving van wetgevingsstandaarden worden gebruikt om vast te stellen in hoeverre sprake is van een 'goede' implementatiewet. Deze standaarden kunnen betrekking hebben op de gevolgde procedure, of op de vorm of inhoud van de betreffende wet.

Ten slotte wordt in hoofdstuk 12 de vraag beantwoord in hoeverre de internationaalrechtelijke regulering van implementatiewetgeving voldoet aan de in hoofdstuk 11 besproken vereisten van goede wetgeving. Daarbij worden in het bijzonder de in het kader van de Organisatie voor Economische Samenwerking en Ontwikkeling (OESO) geformuleerde wetgevingsstandaarden als maatstaf genomen, omdat zij, anders dan de standaarden die deel uit maken van het Nederlandse of Britse wetgevingskwaliteitsbeleid of het wetgevingskwaliteitsbeleid van de EU, het enige regime is met een internationaal perspectief. Deze vergelijking vindt plaats aan de hand van de reikwijdte, de aard en de inhoud van de wetgevingsstandaarden. Ten aanzien van de reikwijdte is een belangrijk verschil dat de wetgevingsstandaarden die zijn geformuleerd in het kader van de OESO van toepassing zijn op een in beginsel onbeperkt aantal wetten die door de nationale wetgever worden voorbereid en vastgesteld. Bij afwezigheid van een regulering van nationale implementatiewetgeving onder algemeen internationaal recht zijn de wetgevingsstandaarden die zijn verankerd in een internationaalrechtelijk regime uitsluitend van toepassing op de nationale implementatiewet die ter uitvoering van dat specifieke regime wordt vastgesteld. Een ander belangrijk verschil is dat de onder de auspiciën van de OESO ontwikkelde wetgevingsstandaarden van toepassing zijn op wetgeving in het algemeen, en niet in het bijzonder op implementatiewetgeving. Ten aanzien van de aard van de wetgevingsstandaarden is er ook

een duidelijk verschil tussen het OESO-regime de internationaalrechtelijke praktijk: waar de wetgevingsstandaarden van de OESO zijn neergelegd in een niet-bindende 'aanbeveling' aan de OESO-staten, zijn de wetgevingsstandaarden die we onder de in deel II besproken regimes hebben waargenomen deels neergelegd in juridisch bindende documenten en deels in juridisch niet-bindende documenten. Ten aanzien van de inhoud van de wetgevingsstandaarden valt vooral de grote overeenkomst op: de wetgevingsstandaarden die deel uitmaken van de internationaalrechtelijke praktijk komen ook terug in de aanbeveling van de OESO. Op basis van deze vergelijking kan worden vastgesteld dat internationale beleidsmakers zich bewust zijn van de standaarden die kunnen bijdragen aan goede implementatiewetgeving; dit bewustzijn heeft echter niet geleid tot een coherente verankering of toepassing van die wetgevingsstandaarden onder internationaal recht.

Deze stand van zaken zou kunnen en moeten worden verbeterd door te voorzien in een codificatie in internationaal verband van wetgevingsstandaarden voor nationale implementatiewetgeving. Die codificatie moet wel voldoende flexibel zijn om de bestaande verschillen tussen rechtssystemen en wetgevingspraktijken van staten te accommoderen. Die flexibiliteit kan op twee manieren worden bereikt: door te kiezen voor codificatie in een niet-bindend document en door de formulering van de betreffende wetgevingsstandaarden in bewoordingen die ze geschikt maken voor gebruik door uiteenlopende rechtssystemen en wetgevingspraktijken. Een dergelijk document zal behulpzaam zijn voor zowel nationale als internationale beleidsmakers en komt de kwaliteit van nationale implementatiewetgeving ten goede, zonder op onaanvaardbare wijze afbreuk te doen aan het democratische gehalte van besluitvorming op nationaal niveau.

Curriculum vitae

Emile Beenakker (1985) obtained degrees in History (BA, MA), Dutch law (LL.B), International law (LL.M) and Legislation (LL.Mleg) from Leiden University, University of Amsterdam and the Academy for Legislation in The Hague. As part of the ERASMUS exchange programme, he studied German language and culture and German contemporary history at the Freie Universität Berlin and the Humboldt-Universität zu Berlin in 2006. In 2008 he took an internship at the Dutch Embassy in Berlin, Germany. For several months in 2010, he was employed as a legal researcher at the Swedish National Defence College in Stockholm, Sweden, on the legal responsibility of states for acts of *cyber* warfare and on *cyber* aspects of the law of belligerent occupation. Between autumn 2011 and spring 2018 he has worked as a legislative lawyer in the Legal department of the Dutch Ministry of Health, Welfare and Sports, on various legislative projects in the field of public health and medical ethics. Since 2014 he has been affiliated to Leiden University's Faculty of Law as an external PhD-candidate. In April 2018 Emile joined the Financial Markets Directorate of the Dutch Ministry of Finance.

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