PÁZMÁNY 1635
— alapítva

Pázmány Law Working Papers

2016/16.

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Constitutional identity and judgements of the ECtHR

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When Mr Clayton the UK member of the Venice Commission suggested at the end of the 101th Plenary Session in December 2014 to give more attention to „alienation of some member states with the European Court of Human Rights" and Prof. Jan Erik Helgesen the member for Norway announced the 2016 Oslo seminar on this issue and proposed that international conferences should be organised on the matter for encouraging dialogue between the European Court of Human Rights and national courts, notably constitutional and supreme courts,[1] many of members thought that the issue is crucial nowadays. If we have a look on the recent contradictions among the judgments of the ECtHR and of national courts, we have to say that the question of final appreciation of constitutional conflicts, particularly conflicts based on or deducted to human rights is essential and important.

As a first example of possible answers to the question let be the amendments of December 2015 to the Federal Constitutional Law no. 1-FKZ of 21 July 1994 on the Constitutional Court of the Russian Federation. In July 2015 the Constitutional Court of Russian Federation ruled "that the Russian Constitution had priority, with the consequence that a decision from the ECtHR that contradicted the Russian Constitution could not be executed in Russia".[2] The amendments of the law underlined the principle of primacy of the constitution, and entitled the Constitutional Court to declare decisions of international courts as unenforceable. The Venice Commission examined the Russian answer and concluded that a state "cannot invoke the provisions of its internal law as justification for its failure to perform a treaty, including the European Convention on Human Rights. The execution of international obligations stemming from a treaty in force for a certain State is incumbent upon the State as a whole, i.e. all State bodies, including the Constitutional Court."[3] However, in spite of roughness of the Russian answer and the foreseeability of the counter-answer of the Venice Commission, the question is unavoidable.

And the question is the following: what can a state or its Constitutional Court do if it finds that a judgement of an international court (e. g. the European Court of Justice or the ECtHR) is contrary to the Constitution. Of course, the primary answer is that the decision itself has to be enforced hence the State is obliged by the international law (e. g. the Treaty on the European Union or the ECHR). But this primary answer does not help in the general acceptance or reluctance of the consequence of the international decision: harmonisation of national jurisprudence with the standpoint of the international court. The question is delicate because the finality and enforceability of the international judgement does not imply that it is also appropriate, applicable for a longer time. Consequently we cannot close the problem saying that scepticism of different states and courts is simply a nationalistic view that should be rejected. Anti-European sentiment in certain states may be disturbing but it has some considerable fundaments.

1 CDL-PL-PV(2014)004-bil, p. 13
2 CDL-AD(2016)005, para 14
3 CDL-AD(2016)005, para 97

A first, obvious but not trivial argument is that such a conflict can arise not among an international and a domestic court but it can be perceived also between international courts. The example is, of course, Opinion 2/13 of the ECJ regarding the accession of the European Union to the ECHR. The ECJ found that the agreement presented by the European Commission on the issue was not compatible with the TEU. The main reason of the opinion was that "jurisdiction to carry out a judicial review of acts, actions or omissions on the part of the EU, including in the light of fundamental rights, cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU".[4] Of course, the EU is – in time – before adherence to ECHR while member states are after. However, the argument of the ECJ is the same that arguments raised by different member states. The reaction of the ECtHR was made public on 23rd of May, 2016 in the Case *Avotins v. Latvia.*[5]The Court sustained the so called Bosphorus presumption:[6] member states of the CoE are liable under ECHR even if when fulfilling other international obligations.[7]

Another argument can be the broader and broader interpretation of human rights. All member states of the CoE undertook to abide by the final judgment of the Court in any case to which they are parties. Formally this obligation cannot loose its effect as time is passing. There is no doubt that all the member states observed this obligation not only in particular cases but they adjusted their legislation and governmental practice to the judgment of the Court. In the same time, from another point of view the legal background did not remain unchanged. Both binding and soft law (recommendations or even the opinions of the Venice Commission) was occupying new fields of law or gave broader interpretations. These changes were infiltrated into jurisdiction of the Court, thus member states had to face more and more small pieces of obligations which were not foreseen before. Just some examples regarding my country: law setting up monopoly of commerce of tobacco[8] declared to violate Article 1 of Protocol No. 1 of the ECHR, different levels of cooperation among different religious groupings and the State in social affaires[9] declared to violate Article 11 of the ECHR.

A following argument can be tensions between lack of political reasons (social reality) and legal obligations. Although Article 1 of the Statute of the CoE mentions a set of values and goals considered to be common for the founding member states and those adhering later, the shape of the Council became dominated by legal aspects. In the case of the Court this is natural: the European Convention is legally binding. But it cannot be left out of consideration that the Convention is "lean" in comparison with constitutions of the member states or even compared to the Universal Declaration of Human Rights (just one example: the Convention does not mention dignity of human beings neither any non-individual right). In the same time social reality is permanently changing what makes necessary new answers to old questions. Not only legal but also political answers are to be given what can cause tensions. One example can be law

4 OPINION 2/13 OF THE COURT (Full Court) on 18 December 2014, para 256

5 Case: Avotins v. Latvia. Application No. 17502/07

6 See: Fisnic Korenica: *The EU Accession to the ECHR.* Springer, 2015, 358-362.

7 See: Steve Peers: *EU law and the ECHR: the Bosphorus presumption is still alive and kicking - the case of Avotiņš v. Latvia.* http://eulawanalysis.blogspot.hu/2016/05/eu-law-and-echr-bosphorus-presumption.html

8 Case Vékony v. Hungary, Application No. 65681/13

9 Case of Magyar Keresztény Mennonita Egyház and Others v. Hungary, Application No. 70945/11 and others.

on measures for combatting terrorism[10] declared to violate Article 8 of the ECHR. In this case applicants were considered persons potentially being subjected to unjustified and disproportionately intrusive measures. Thus not a real abuse but only its possibility was declared contrary to the ECHR, what gives a role to the ECtHR similar to constitutional courts: it effectuated abstract control of legal acts. The situation and need for new rules after Bruxelles-terror highlights the inconsistency of the judgment with the social and legal reality.

Another reason can be based on the fading difference between binding and soft law. The role of the Venice Commission can be a sufficient example. The Commission never misses to stress that its opinions are non-binding, member states are free to accept or to reject them. This approach does not fit perfectly the reality. In general an opinion left out of consideration is often remarked (by monitoring, by launching of different proceedings, by our follow-up mechanism). For member states which are also members of the EU the situation is even more serious. *Communication from the Commission to the European Parliament and the Council* COM (2014) 158 on *A new EU Framework to strengthen the Rule of Law* in the last paragraph of item 4 states that "The Commission will, as a rule and in appropriate cases, seek the advice of the Council of Europe and/or its Venice Commission, and will coordinate its analysis with them in all cases where the matter is also under their consideration and analysis." The consequence of actions based on the Framework may lead to legal proceedings before the ECJ or political proceedings within the European Parliament. Hence – especially if an ECJ action is launched – the soft law opinion of the venice Commission may be "upgraded" to binding force. This is another phenomenon which may disturb the member states. Poland – as a first member states – faces the consequences of the Framework.[11]

A not simply symbolic argument can be the consistent difference in text between "old" and "new" democracies. The practical situation does not need any explication, while its adequacy does. In the first years of activity of the Venice Commission this difference could have reasons. As time is passing the reasons are thinning. Firstly, an ontological argument is coming up: what is the starting point of this comparison – the fall of the Roman Empire? Westphalia? The Glorious Revolution? The French Revolution? 1848? 1920? The end of the second World War? The foundation of the CoE? The farther starting point is chosen the less member states may be considered "old" democracies. Secondly, a mathematical argument is to be considered: proportion of age among "old" and "new" democracies is decreasing year after year. Thirdly, this difference may be disobliging for people of different "new" democracies (just for example: Poland was the country attacked by nazis what caused the second World War, but this country together with Czechoslovakia did not choose their authoritarian communist regime, they were left in the hand of Stalin by "old" democracies. However, these two countries could serve as example for any democracy: Poland as the first "new" democracy which achieved the transition in a real democratic and peaceful way, the people of Czechoslovakia could managed the "divorce" to Czech Republic and Slovak Republic in an exemplary manner to the whole world).

10 Case of Szabó and Vissy v. Hungary, Application No. 37138/14

11 See: Commission Opinion on the Rule of Law in Poland and the Rule of Law Framework: Questions & Answers. http://europa.eu/rapid/press-release_MEMO-16-2017_en.htm

The lastly mentioned argument is reluctance of the Court to accept arguments based on constitutional identity. Certain – not small – groups of people feel that the Court and generally the rule of law serves only "others", while general values are forgotten. During the conference on lustration in Prague I analysed some cases: Korbely v. Hungary, Ap. no 9174/02 (volley in 1956) or Vajnai v. Hungary, Ap. no 33629/06 (prohibition of public wearing of communist symbols, e.g. the red star). This argument leads to one of the most disturbing phenomenon, exemplified just by the term of "sovereignists": expropriation of values like rule of law or human rights by different political movements. If rule of law or human rights are instrumentalised and used as weapons in political debates than these values are transformed from common ideals to sectarian idols. Thus "Strasbourg" or "Bruxelles" or "Luxembourg" may became blasphemy for other political movements. It is more than a simple coincidence that in the last years the UK expressed doubts regarding judgements of the ECtHR with the same or even tougher tonality than the Russian Federation, even twanging to leave the ECHR. I think that the UK should be considered as an old democracy with certain constitutional identity.[12] It needs attention if such an old democracy feels its identity endangered by the ECtHR.

The conclusion cannot be avoided: rule of law and primacy of international law requires that judgements of international courts are observed and enforced. But if there is no instrument to correct inappropriate judgments, if there is no balance to the unlimited power of international courts that expropriate legislation, if constitutional courts are mere servants of international courts than we face arbitrariness. Than the old and common European ideal of rule of law becomes a tyrannous idol. Than a new order is coming: the euro-absolutism. This new order may be called "Juristocracy" as Prof. Béla Pokol proposes[13]. Do we think that constitutional courts may silently cooperate to this fearful process? Do we think that the principle of democracy may become an empty reference?

12 http://www.telegraph.co.uk/news/uknews/law-and-order/11911057/David-Cameron-I-will-ignore-Europes-top-court-on-prisoner-voting.html, http://www.mirror.co.uk/news/uk-news/david-cameron-considers-exit-european-5816205

13 See: Béla Pokol: *The Juristocratic Form of Government and its Structural Issues.* PLWP Nr. 2016/9. http://d18wh0wf8v71m4.cloudfront.net/docs/wp/2016/2016-09_Pokol.pdf