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REFLECTIONS ON THE INTERPLAY BETWEEN THE DOMESTIC COURTS AND THE EUROPEAN COURT OF HUMAN RIGHTS

I

The European Convention on Human Rights reflects collective understanding of universal legal and moral norms applicable to all people of Europe. By becoming a contracting party to the Convention the respective countries, to use the wording of Article 1, undertake the obligation to secure everyone within their jurisdiction the rights provided for in the substantive provisions. In this respect the European Convention on Human Rights does not differ much from other international human rights treatises. However, it has specific features which distinguish it from other international human rights treatises, namely the establishment of the European Court of Human Rights (ECtHR), individual petition and the binding nature of the judgments under Article 46 of the Convention, whereby the contracting states undertake to abide by the final judgment of the Court in any case which they are parties. These specific features call for co-operation and mutual understanding between the national Courts (including Constitutional Courts) and the ECtHR, but at the same time it is also a source of disagreement, even confrontation.

II

In the history of the Court there are many examples where judgments of the ECtHR have been a received with great reservations in the respective countries. Almost all the contracting States have experience this in one form or another. One recent example is the reaction in Germany to the judgment in the Hannover case where the Court «overruled» the Constitutional Court of Germany (Bundeverfassungsgericht) as regards the latter's balancing of Article 8 and Article 10 rights [1]. Another example is the *Görgülü* – case [2]. The rulings of the ECtHR in these cases were not well received in German legal circles to say the least. Even former judges at the highest Courts protested [3]. The third example is *Hirst* v *United Kingdom* on prisoners' voting rights [4]. There are many other examples.

III

It is understandable that the decisions of the Strasbourg Court at times meet resistance and criticism. The highest Courts in all the Contracting States have had their conclusions as regards protection of human rights «rejected» by the ECtHR, and sometimes in cases of great legal and political importance in the respective country. This has at times given rise to negative sentiments towards the Strasbourg Court. National judges, law professors, politicians and others accuse the court of having misunderstood national law, failing to understand the national situation properly and not being aware of the historical, social and political context in which the case is rooted, and so on and so forth. Some would question the ability of the judges to fully understand the situation in a far away country. Thus, for example, I am sure that some would claim that a judge from Iceland, an island far away up in stormy North Atlantic, will have difficulties in fully understanding in detail the historical, economical and legal situation in country like Ukraine. This is of course true, just as a judge from Ukraine will have difficulties with understanding the situation in Iceland. But not with standing all our differences we have agreed among ourselves to abide by the Convention in an attempt to find a common standard for the protection of fundamental human rights applicable in Reykjavik as well as Odessa, and all the places there between. It is the role of the Court to identify and to consolidate a universal common standard for all the Contracting Parties. This will of course never be done to everyone's liking.

IV

But the misgivings by which the judgments of the Strasbourg are sometimes received will not be fully explained by the factors mentioned above. They also have their roots in different constitutional and political traditions and approaches, especially when it comes to the appreciation and acceptance of the Convention and the case law of the Court in the national system. On the one hand we have *pro-international* (pro-globalisation) way of thinking, and on the other hand we have an emphasis on *self-determination* and *sovereignty* of states. Those approaching the issue from the point of view of international institutions like the Court tend to adhere to the former approach. Those who approach it from the point of view of the domestic law and the domestic court are inclined to emphasis the latter [5].

The *pro-internationalists (pro-globalists*) advocate a constitutional system and political theory aiming at advancing an ethical position where supremacy of international human rights law is at the centre. International law is seen as best serving certain moral principles and justice, aiming, first and foremost, at respect for human rights and welfare of individuals. As such these theories postulate the existence of general legal principles based on moral principles and ideas of natural law and natural rights of individuals to a protection of their fundamental human rights [6].

It is argued that on these points it is important that individuals not only have rights based on international rules, but also that states have duty to fulfil them. It is submitted that only binding rules of international law will achieve this aim and that too much emphasis on a international system based on independent sovereign states where each state sets it own standards stands in the way of reaching universal standard for all people.

A common element in pro-internationalist approach is also a certain dislike for the state as an abstraction and an «aversion for state omnipotence». An aversion developed during the twentieth Century to contest the idea that within the framework of sovereignty, states could do what they wanted *vis-à-vis* individuals within their jurisdiction, without any repercussions on behalf of other states based on international law [7].

Sovereignty or state omnipotence has in this way been blamed for the horrors of wars and large scale human rights violations in course of the century, in particular during times of war. This has allegedly led to a certain distrust of the state as a vehicle for upholding and respecting fundamental principles of law, most importantly fundamental human rights, and given support to theories which ideologically sever the law from the state by referring to some higher law that states must follow v*is-à-vis* individuals. Due to the link between emphasis on sovereignty in the lawmaking process and the dualist approach to international law these anti-sovereignty doctrines were inclined at the same to be *anti-dualist* and to replace dualism by the so called *monist* approach, by emphasising the homogeneity of international law and national law. Those who work in an international environment are inclined to look at things from this point of view.

V

On the other side we have the national judges who are prone to advocate idea of *self-determination* and *sovereignty* of states, together with the rule of law within the boundary of the state, ideas of separation of powers, in particular the separation between legislative and executive powers, as well as ideas of democratic process and development [8].

It is argued that national law should not be automatically subject to changes in events on the international level over which the national legislature has no control, for example in light of a case law from an international court like the ECtHR. By viewing national law and international law as distinct legal orders, one protects sovereignty and national self-determination, as well as the internal democratic political processes, against direct legislation by a treaty or direct application of the courts thereof.

Another constitutional element here, which is often associated with dualism, is the separation of powers between the different branches of government, where the head of state, holding highest executive power is responsible for negotiating and finalising (ratifying) international treaties and the legislator makes new law. Since in many of dualist countries, *i.a.* the Nordic countries, ratification of treaties is a matter for the executive (with some exceptions) it must be assumed that a further involvement of the legislature is needed before an international norm contained in a treaty becomes a part of the internal order.

Further consideration in favour of this approach derives from the idea of rule of law and legal certainty where the minimum demand is that it should be possible to say with reasonable certainty whether or not a specified norm forms a part of the municipal system. This argument is specifically directed at certain pro international approaches who allegedly offer unclear criteria as to whether a given norm automatically becomes a part of the national legal order or not.

Reference to *self-determination* and *sovereignty* of states dose not only relate to the very nature of law from a philosophical point of view as positivist, but also becomes a constitutional theory and is seen as being consistent with, and at the same time to protect, fundamental constitutional values of democracy, sovereignty and self-determination. This of course is easily translated into a political theory where as the protection of these values becomes a central issue, at equal footing with the protection of fundamental human rights.

VI

Favouring one approach or the other clearly dictates the acceptance or, as the case may be, the non-acceptances of international law by the domestic courts, including judgments of international tribunals like the ECtHR. Thus on the one hand we have those who hold that reluctance to accepting international law without clear approval of the legislature is more consistent with the idea of democracy, the democratic process behind legislation and democratic accountability, as the responsibility of the legislature for a given norm is clearer. These considerations emerge on the purely political level as views which are more leaned to politics sceptical of globalisation as a threat to sovereignty and independence of the nation State. On the other hand we have those promoting progressive internationalism and openness to international norms as more consistent with effective protection of fundamental rights in line with common standards and natural law and natural rights of individuals.

VII

I submit that the reasons for the sometimes somewhat heated tensions between national courts and the ECtHR is at least partly a result of the clash between progressive internationalism as the best way to protect fundamental rights and the emphasis on sovereign states and the democratic process within states as the best forum for the same.

The judges of the court are aware of these different approaches and seek to find a middle way. Of course they must be truthful to their mission to define a common standard for the protection of human rights in Europe and thus often rule against the national courts. At the same time accept, as that the national authorities and courts are, by reason of their direct and continuous contact with the vital forces of their countries are in principle better placed than an international court to evaluate local needs and conditions [9]. It is precisely for this reasons that the court has developed some key concepts that server to facilitate co-operation between the national Courts and the ECtHR and to alleviate tensions.

First one should mention, the principle of *judicial restraint*, under which the Court would sometimes avoid a progressive approach which aims at extending the protection under the provisions of the Convention beyond traditional or common understanding of the role of an international judicial body, and thus leave it rather to the contracting parties themselves, the states, to define the legal status within the framework of the democratic process in each individual country. Many

critics argue that the Court has not always succeeded in this regard and it has at time been far too progressive. However, the Court is conscious of the balance that must be struck in this regard.

Another concept is *the margin of appreciation* which relates to the discretion of the national authorities and the national courts. In the case law of the ECtHR at least three different versions of the concept can be identified.

Firstly it relates to the means chosen by the states to effectively protect the rights under the Convention. It reflects the acknowledgement of the fact that states may use different means to achieve the same goal.

Secondly, it relates to the balancing exercise between the protection of individual rights and collective goals. It is accepted that states have a certain margin to limit rights to achieve certain common goals or goods relating to the welfare of society as a whole.

Thirdly, the concept of margin of appreciation relates to the intensity of the scrutiny as to whether rights have been violated. It reflects a certain willingness to accept the domestic courts assessment thereof if it is based on the relevant criteria established by the court in its earlier case law.

The margin of appreciation has been welcomed on the national level although many would advocate for a wider margin. However, not surprisingly, the pro-internationalists are not all happy. There are scholars who argue that under a certain understanding of the moral character of human rights and of the role of judicial review, the use of the concept of margin of appreciation cannot be morally justified [10].

And finally, one should mention the concept of subsidiary whereby under the Convention applicants are required to exhaust domestic remedies to give the domestic courts an opportunity to put things right before the applicant can bring his case to Strasbourg. This is not an invention by the Court, but directly provided for by the Convention.

References

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Summary

Björgvinsson David Thór. **Reflections on the interplay between the domestic courts and the European court of human rights.** – Article.

The article deals with the co-operation between the national Courts (including Constitutional Courts) and the European Court of Human Rights. Analyzed two ways of thinking: pro-international (pro-globalisation) and domestic with the emphasis on self-determination and sovereignty states. Discussed the correlation between international law and domestic law.

Keywords: the European Convention on Human Rights, the European Court of Human Rights, self-determination, sovereignty, case law.

Аннотация

Бйоргвинсон Дэвид Тор. **Размышления о взаимодействии между национальными судами и Европейским судом по правам человека.** – Статья.

В статье рассмотрены вопросы взаимодействия между национальными судами (включая конституционные суды) и Европейским судом по правам человека. Проанализировано два образа мышления: про-международное (проглобализационое) и внутригосударственное с акцентом на самоопределение и суверенитет государств. Рассмотрены вопросы соотношения международного права и внутригосударственного.

Ключевые слова: Европейская конвенция по правам человека, Европейский суд по правам человека, самоопределение, суверенитет, прецедентное право.

Анотація

Бйоргвінсон Девід Тор. **Роздуми про взаємодію між національними судами і Європейським судом з прав людини.** – Стаття.

У статті розглянуті питання взаємодії між національними судами (включаючи конституційні суди) та Європейським судом з прав людини. Проаналізовано два образа мислення: про-міжнародне (про-глобалізаційне) і внутрішньодержавне з акцентом на самовизначення та суверенітет держав. Розглянуті питання співвідношення міжнародного права і внутрішньодержавного.

Ключові слова: Європейська конвенція з прав людини, Європейський суд з прав людини, самовизначення, суверенітет, прецедентне право