Juridisation of Human Rights Protection from the Viewpoint of Slovakia, Russia and the Council of Europe

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Summary: This article deals with the question of the so-called juridisation of human rights. The author describes and analyses the main related topics to this general theme, in concrete the right of judicial protection, binding effect of court decisions, enforceability of court decisions. He uses the ECtHR case law related particularly related to the Russia and Slovakia to prove the Court's approach to the main topic of the research.

Keywords: Human Rights, Juridisation, The right of Judicial Protection, Binding Effect of Court Decisions, Enforceability of Court Decisions, Russia, Slovakia, Council of Europe

1. Introduction

It took about 200 years for the human rights to proceed, in a revolutionary way, from academic articles into political (constitutional) documents and it lasted the same time until they got into real life through application thereof by the human rights protection bodies. In particular, the second part of that period is distinguished by evolution, universalisation and eventually by juridisation.

Evolution of human rights is a natural consequence of several factors, from globalisation (which weakens the sovereignty of the State, thus giving the option for e.g. supranational subjects to protect the human rights), to nationalisation, in reference with globalisation, paradoxically connected with the growth of the role of the State in various aspects of the life of the society, demonstrated by overregulation of human conduct, accompanied by the possibility of occurrence of e.g. various kinds of discrimination. On one hand, overregulation creates still larger room for the State to interfere, both negatively (e.g. as concerns the fight against terrorism), and positively (e.g. in the social sphere), but, on the other hand, it paradoxically makes room for privatisation of the State and law.

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Of course, this also brings the risk of less controlled or uncontrolled at all, respectively, infringement of human rights by private subjects. Most significant signs of that can be found in so-called cyberspace that is the ground for most serious encroachments into private human life with only limited options of protection, since responsibility is dissolved in the virtual reality. In this confused evolutionary development, human rights protection needs to search new forms. The most distinctive of them are the doctrines of "radiation" of human rights and the doctrine of the positive obligation of the State.

Both the doctrines have distinctively been supported by the European Court of Human Rights by the application of the Convention for the Protection of Human Rights and Fundamental Freedoms which, unlike typical international treaties, goes beyond the limits of a simple mutuality between the contracting States. It enriches the net of reciprocal synallagmatic obligations by objective obligations, which are, in the sense of the Preamble to the Convention for the Protection of Human Rights and Fundamental Freedoms, protected by collective guarantees. It was this very fact that enabled juridisation of human rights.

Juridisation of human rights derives from the commonly known notion of enforceability of law that contains:

a) the right of judicial protection,
b) binding effect of court decisions,
c) enforceability of court decisions.

2. The right of judicial protection

The right of judicial protection, the content of which is commonly known, is in decision-making activities of the European Court of Human rights distinguished by

- enlarging the scope of matters under judicial protection,
- improving the guarantees of judicial protection,
- processualisation of substantive-law provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms.

2.1. Enlarging the scope of matters under judicial protection

The way for enlarging the scope of matters under judicial protection is an extensive interpretation of the terms contained in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, in particular of the term "civil rights and obligations" and "criminal offence". First, the European Court of Human Right's interpretation is primarily based on the casuistic

method, and, second, on the decisive criterion whether to judge if the subject of the particular proceeding is protected by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms is its subject-matter nature and not the legal branch within which it is classified by the respective domestic legal order, irrespectively of which (what) national body has the jurisdiction over the matter.

2.2. Improving the guarantees of judicial protection

Improving the guarantees of the right to a fair trial does not follow the methodology used by the European Court of Human Rights at determining the subject-matter jurisdiction of courts, but it is based on the complexity of attitude.[1] On the other hand, certain modalities of the complexity principle are adjusted, upon taking into account the exceptionality and individuality of the judged proceeding.[2]

2.3. Processualisation of substantive-law provisions

Processualisation of substantive-law provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms represents a specific way of extending the right of judicial protection. The right of judicial protection is guaranteed by Articles 5, 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, in the form of the right to the access to court, and guarantees of a fair trial. The European Court of Human Rights in its largest case-law, referring to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which is the most frequent subject of complaints, has defined a certain minimum standard of guarantees for a fair trial, which, though, does not necessarily take into account certain specific distinctions of human rights, particularly protected by the Convention for the Protection of Human Rights and Fundamental Freedoms. Apparently, this was one of the reasons why the judges of the European Court of Human

[1] For example, as concerns decision-making of the Slovak Constitutional Court, one of the issues that the Court was criticised for by the European Court of Human Rights was that the Slovak Court did not view prolongations in court proceedings as the sum of the particular proceedings held at all levels of the courts that heard the case, but the Slovak Constitutional Court defines the length of a court proceeding by the individual stages of the proceeding.

[2] As an example, we may note that not every guarantee is weighed equally upon claiming thereof at various levels of court instance. For example, where a court of a higher level of the court system examines the heard case from the viewpoint of legal classification without being supplemented with evidence, then the rule of public hearing is applied only in a modified version, as compared with its application at courts of first instance. See e.g. decision in *De Cubber v. Belgium* case of 26 October 1984.

Rights decided to study also the procedural part of violation of substantive law. The other reason, highlighted by B. Repík[3], consists in the fact that the judges of the European Court of Human Rights would often take the role of investigators in cases initiated by a complaint, thereby substituting national investigative bodies, that failed to do their duties, in particular as concerns most extreme cases of violation of human rights, such as the right to life or prohibition of torture. It was exactly in reference with the pleaded violation of those human rights that the European Court of Human Rights has developed the basic criteria for assessing efficiency of national investigations of violation of fundamental human rights.

Of a different nature are procedural guarantees in cases that do not fall within criminal law, while it is interesting that it was family law (the right to respect for family life, protected by Article of the 8 Convention for the Protection of Human Rights and Fundamental Freedoms), with which the origins of the development of implicit procedural guarantees are connected. The differences are based on the facts that firstly, the State has a certain discretion (marge d'appréciation) at defining the rules of a court trial, where e.g. a judgement granting the custody of a child to foster parents is decided upon, and secondly, at determining the procedural rules, the restricting clauses, stated in the second sections of Articles 8 through 11, must be taken into account, and third, they have to go through a proportionality test, as usually applied at such proceedings. It is the last modality that may give the impression that the exponential growth in using implicit procedural guarantees is related to a lower interest (desire?) of judges of the European Court of Human Rights to investigate the substantive-law nature of violation of a human right, since that is unproportionally difficult as concerns deciding between two interests that are "in the game". Therefore, in the case of application of procedural relevance and consequent ascertainment of breach of procedural guarantees related to the protection of substantive law, they may feel satisfied with the pronouncement thereof, and they would consider the test of proportionality redundant. We may agree with B. Repík, who states that the actual objective of the still wider use of implicit procedural obligations of the State is not the effort to expand its own powers (the scope of investigation), but, on the contrary, it is the effort to shift the issue of resolving the problem onto national courts.[4]

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[3] Cf. REPÍK, B.: Implicitní procesní ochrana základních materiálních práv v judikatuře Evropského soudu pro lidská práva. Právník 9/2008, pp. 946–947.

[4] "Strengthening of the control over the procedural part of the protection of human rights is therefore merely one of the means to force the State to solve the issue at the national level already." REPÍK, B.: Implicitní ibid, footnote 3, pp. 964.

3. Binding effect of Court decisions

The right to judicial protection provide guarantees for the option to apply substantive law at court, within a fair trial. The right to the access to court, as well as general rules of a fair trial, adequately apply to the European Court of Human Rights that decides upon substantive law, i.e. upon breach of a human right. A valid resolution becomes binding upon the issuance thereof. However, what is the content of the term "valid resolution issued by the European Court of Human Rights at the protection of human rights"? The first answer is related to the content of the resolution. It is rather simple, as the Convention for the Protection of Human Rights and Fundamental Freedoms alone defines what may be a relief of the resolution. In the case of a confirmed violation of a human right, firstly concerned is *restitutio in integrum*, and secondly, it is a just satisfaction by virtue of Article 41 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Within the special part of its resolutions, the Court, under the term "just satisfaction", resolves three issues, as are the removal of negative consequences of confirmed violation of a human right, in particular compensation for proprietary loss, compensation for injury to reputation and compensation for court costs. Considering the fact that court decisions contain those items regularly, there is a large source ground for a case analysis.

The second issue is the reception of the binding effect of a decision of the European Court of Human Rights in the Council of Europe Member States, while this issue must be distinguished from enforceability of the resolution in a particular case. An important and inspiring element in the continental Europe is the attitude of the German Federal Constitutional Court, which was confirmed by the following of its example in the case of the attitude of national courts to the decisions of the Court of Justice of the European Communities (currently the Court of Justice of the European Union).

In the beginning, for more than ten years the Slovak Constitutional Court held the opinion that human rights that result from international conventions were not constitutional rights.[5] Later, the Court reconsidered that opinion, and by a court decision of the European Court of Human Rights, the Slovak court recognised application priority of human rights over the Slovak laws[6] and those decisions currently serve as a ground for binding rules of interpretation both at concrete and abstract guarding of constitutionality.

[5] Decision of the Constitutional Court of the Slovak Republic No. II. ÚS 91/99.

[6] Decision of the Constitutional Court of the Slovak Republic No. I. ÚS 100/04.

A similar conclusion was reached by the Russian Constitutional Court[7] that stated that the Convention for the Protection of Human Rights and Fundamental Freedoms and the decisions of the European Court of Human Rights based thereon, reflecting the generally recognised principles and standards of international law, constituted a part of the Russian legal order. This fact must be taken into consideration not only by legislators, but also by bodies of application of law. The Supreme Court of the Russian Federation took a similar attitude (Resolution on juridical precedent of 19 December 2003), under which general courts shall take into account the decisions of the European Court of Human Rights that interpret the parts of the Convention for the Protection of Human Rights and Fundamental Freedoms which are applicable in a particular case before a general court.

In Russian professional legal writing, there is a wide span as concerns the issue of bindingness of the decisions of the European Court of Human Rights. Major part of authors adhere to the traditional model of judicial precedents as an informal source of law (binding *de facto* and not *de jure*), and recognition of the decisions issued by the European Court of Human Rights is based on acceptance of the common European cultural values.[8]

4. Enforceability of Court decisions

Enforceability of decisions of the European Court of Human Rights in a particular case is derived from the fact that their character is declarative, which means that

- they are not an execution title within the national legal system,
- the means to secure the execution thereof are chosen by the particular affected Member State of the Council of Europe.

The manner of enforceability of decisions of the European Court of Human Rights follows from the cause of breach of the particular human right. In general, there may be two causes of violation of human rights:

- relating to the application, and
- normative.

In the first case the European Court of Human Rights does not question the national legal regulation, but either its incorrect application in the particular case or the incorrect application practice. The subject of criticism in the latter

[7] Decision No. 2-P of 5 February 2007.

[8] Cf. e.g. Kanaševskij, V. A.: Precedentnaja praktika Evropejskogo Suda po pravam čeloveka kak reguljator graždanskich otnošenij in RF. Žurnal rossijskogo prava, No. 4, 2003.

case is the national legal regulation that causes violation of human rights in the application practice.

Executability of the decisions that have proved violation of a particular human right by an incorrect application of national legal regulations is usually ensured by the means of extraordinary remedial measures, the legal title of application of which is the decision of the European Court of Human Rights.

Currently, there are three groups of the Member States of the Council of Europe that have been resolving, within their respective national legal regulations, the possibility to review a judicial trial on the basis of a decision by European Court of Human Rights. In the first group (for example Russia, Austria, Norway, Switzerland), review of a judicial trial is directly permitted. In the second group (for example Slovakia, Finland, France) the decision of the European Court of Human Rights is considered "a new fact" that may re-open the case and in the third group of states (for example the Netherlands, Germany, Spain) there is no such an option.[9]

For a long period, the European Court of Human Rights was reserved whether to determine if application of the institute of re-opening the case should be obligatory once a judgement in the particular case has been issued. As a rule and almost explicitly, the Court insisted that the Convention for the Protection of Human Rights and Fundamental Freedoms did not give any power to ECHR to request a State to re-open the case as a consequence of the Court's ruling.[10]

Important in his context was the judgement of the Grand Chamber in the *Verein Gegen Tierfabriken v. Schweiz* case,[11] where the Swiss Supreme Court for formal reasons did not permit a new trial that might have executed the decision of the European Court of Human Rights. The Committee of Ministers, that supervises the execution of the European Court of Human Rights judgements decisions, declared the judgment as executed. The applicant addressed the European Court of Human Rights with actually the same complaint, but the Court

[9] As a footnote, we may mention that in Russia the application or over-application (in the sense of jeopardising legal certainty) of extraordinary remedial measure (supervision) may cause problems, too. In contrary to the changed legislature that respected also decisions of the European Court of Human Rights, the European Court of Human Rights stated in its decision in *Kot v. Russian Federation* (application No. 20887/03 of 18 January 2007) that valid and executable court decisions may only be altered at exceptional cases, while the only purpose for them must not be merely the fact that the party to a court trial has received a new court decision. Resolution of the Committee of Ministers of 8 February 2007 states that the legal institute of supervision as regulated by the Rules of Court Proceedings was is in variance with the Convention for the Protection of Human Rights and Freedoms.

[10] Cf. e.g. decisions in *Lyons et al. v. United Kingdom* (2003), *Fische v. Austria* (2003), *Krčmář et al. v. Czech Republic* of 3 March 2000.

[11] Decision *Verein Gegen Tierfabriken Schweiz v. Switzerland of* 30 June 2009.

did not consider the issue *res iudicata,* but for the reason of rejection of a new trial the Court found a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms, thus indirectly denying the power of the Committee of Ministers at the execution of its decisions.[12]

The growing number of complaints related to the execution of judicial decisions proves the complexity of the issue of enforceability of law. The European Court of Human Rights therefore gradually accepts general rules also in this field, which follow from the herein abovementioned precedent decisions. Some of them are the following:

- the right to execute final decisions is not absolute, which means that in civil law the State is not automatically responsible for unenforceability of any judgement, which does not apply for criminal law, though,[13]
- it is the positive obligation of the State to establish sufficient, adequate and efficient means to enable the execution of judicial decisions[14] and it is the role of the European Court of Human Rights to subsequently judge if the national bodies have duly used that means in the practice,
- delay in execution of judicial decision shall be violation of Article No. 6 section 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as violation of the right to a fair and undelayed trial.[15]

Failure to execute juridical decisions, including decisions of the European Court of Human Rights, is one of the most serious and still lasting failures that the European Court of Human Rights has been criticising, despite the fact that the legal regulation explicitly provides mechanisms and periods to execute the judgement.[16] The European Court of Human Rights will not accept a defence

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[12] Also earlier the European Court (e.g. in its decision in *Burdov v. Russia* of 7 May 2002) stated breach of human rights by failure to execute its decision, but those cases concerned failures to execute the part of the decision by which the applicant was entitled to financial compensation, and the State reasoned the failure to execute the decision by lack of finance.

[13] In the case of *Assanidzé v. Georgia* of 2004, the European Court of Human Rights stated that criminal conduct is a single unit and the protection of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms is not accomplished by the deliverance of acquittal. The Convention for the Protection of Human Rights and Fundamental Freedoms lost effect and its Article 6 was breached by the failure to execute the judgement of acquittal and by the failure to release the complainant from imprisonment.

[14] See e.g. the decision in the case of *Timbal v. Moldavia* of 14 September 2004.

[15] Cf. e.g. the decisions in the case of *Cvijetić v. Croatia* of 26 February 2004, *Prodan v. Moldavia* of 18 May 2004, *Romashov v. Ukraine of* 27 July 2004.

[16] For example, Article No. 415, section 5 of the Criminal Proceedings Rules provides that the Presidium of the Supreme Court shall conduct re-opening of a court proceeding within one month from issuance of the decision by the European Court of Human Rights which ruled that Russia has breached the Convention for the Protection of Human Rights and Fundamental

based on economic conditions of the concerned State. In the case of *Burdov (No. 2) v. Russia*[17] the Court stated that the failure to execute court decisions imposing performance by the State was a system-related and systematic problem of the Russian Federation.

More complicated circumstances may occur in the case that the reason of breach of a human right is not the applied practice, but the legal regulation. The European Court of Human Rights does not have the jurisdiction to directly order the State to alter its legal regulations.[18] In exceptional cases, when an insufficient legal regulation leads to repeated and mass filing of applications, the Court will express its opinions as concerns the national legal regulations in a more vigorous way.

A possible option to resolve the problem was suggested by the Slovak Republic at the execution of decision in the *Lauko* case,[19] wherein the cause of a human right violation was the Minor Offences Act under which certain sanctions could be imposed (e.g. a fee up to SK 2000) without the option of court review.

In this case it came to the use of the situation when the Constitutional Court has breached Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, since the Court failed to abrogate an unconstitutional act. Ironically, the Constitutional Court is not entitled to file a motion to review the constitutionality of a constitutional act. There the Attorney General was used, who at his own initiative filed a motion to the Constitutional Court, asking it to review the grounds of constitutionality of an act on the basis of the reasons stated in the decision of the European Court of Human Rights. The Constitutional Court allowed the application and abrogated the act.

In this context, we would like to mention cases where the complaints are not directed against the Slovak Republic, but the Slovak law is in contradiction with a decision of the European Court of Human Rights. Similarly, in such cases Attorney General usually files a motion to the Constitutional Court, which will then issue a judgement taking into account the decision of the European

Freedoms. In the case of *Baklanov v. Russia* (decision of 9 June 2005, considering the application No. 68433/01), the Russian Supreme Court, after three years from the issuance of the judgement of the European Court of Human Rights, has not started to act and it was proved that the misconduct was the absence of a legal period for the president of the Supreme Court to produce the judgement of the European Court of Human Rights to the Presidium of the Supreme Court of the Russian Federation.

[17] Judgement of 15 January 2009 relating to application No. 33509/04.

[18] For example, in the case of *Belilos v. Switzerland of* 29 April 1988, the European Court of Human Rights rejected the application that requested the Court to order the national bodies to adopt an amendment to an Act.

[19] Decision in the case *Laukov v. the Slovak Republic of* 2 September 1998.

Court of Human Rights that will usually declare the contested act unconstitutional. In case that the entitled person does not file the motion to the Constitutional Court, the Constitutional Court has developed a case-law stating that a general court is obliged to directly apply the decisions of the European Court of Human Rights, thereby actually forcing the judge to ignore law in this particular case. However, such cases are rather rare in practice.[20]

The binding effect of decisions of the European Court of Human Rights (together with decisions of the Court of Justice of the European Union, they constitute a *quasi* European *common law*) and enforceability of its decisions create the basis for enforceability of the Convention for the Protection of Human Rights and Fundamental Freedoms and their gradual growing in force of the present juridisation of human rights as one of the most distinctive features of the present protection of human rights in Europe.

[20] See the judgement of the Constitutional Court of the Slovak Republic, No. I. ÚS 100/2004.