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The Hungarian Constitutional Court's case with the ECHR: an ambivalent relationship

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Hungary was the first country in the post-Soviet bloc that joined the Council of Europe and ratified the European Convention on Human Rights (Convention/ECHR) and this remains a matter of national pride. While the Convention is perceived as a yardstick in human rights protection that may not be circumvented, still lively debate surrounds the authority of the case-law of European Court of Human Rights (ECtHR). The recent constitutional reform has left the status of the Convention largely untouched. The Convention still enjoys a supra-legislative rank: it is subordinated to the Fundamental Law (FL) but is superior to all other pieces of legislation.

Although the Hungarian Constitutional Court (CCt) had started its operation three years before Hungary ratified the Convention, it did not prevent the CCt from making references to the text. In the first formative years, the CCt primarily relied on the text of the Convention and attributed a complementary role to the case-law of the ECtHR. Without openly recognizing the primacy of the Convention standards, the CCt committed itself to ensure compliance between the ECtHR jurisprudence the domestic law, and left the possibility open to revise its prior position if the development of the former required so. However, the ambitious statements remained empty phrases mostly without a noticeable impact.

Invoking meta-constitutional principles and values has never been alien to the CCt: be it the 'invisible Constitution' first articulated by Justice Sólyom in his concurring opinion to decision abolishing capital punishment, or the 'core content' of the Constitution embracing – among others – the constitutional rights as accepted in the common European tradition and reflected in the documents of the Council Europe. The substantive reinterpretation of the role of international law in constitutional adjudication was primarily triggered by the eroding constitutional guarantees and the arbitrariness of the legislative power were often used to discipline the CCt. From 2011 onwards justices increasingly turned towards standards and safeguards outside of Hungary, and the relevance of the ECtHR's case-law references significantly increased. In the landmark case on the possible review on constitutional amendments the CCt declared:

> *(I)n case of certain fundamental rights the Constitution formulates the core content of the right in the same way as an international treaty (like the International Covenant on Civil and Political Rights or the European Convention on Human Rights). In these cases the level of protection offered by the [CCt] may not be lower than the level of protection guaranteed internationally (particularly as elaborated by the [ECtHR]).*

In order to preempt misinterpretation, the CCt added: in line with the principle of *pacta sunt servanda* the jurisprudence of the ECtHR has to be followed even if it contradicts the prior case-law of the CCt. The decision – for the first time – explicitly recognized that the Convention standards serve as a minimum level of protection from which neither the CCt, nor the legislator can deviate. Referring the Convention case-law is no longer a lip service from CCt, the consistent interpretation – at least in theory – has become a clear obligation. Decision no. 61/2011 (VII. 13.) established a rule of equivalency, which entails that the ECHR jurisprudence shall enjoy interpretive priority even in abstract review or constitutional complaint procedures where the petitioner (mainly due to lack of standing) fails to claim conflict with international treaties.

The principle of interpretive priority has been put to test several times since 2011. In 2013 the CCt was called on to take a stand in the politically heated debate on the public display of the red star. Hungary was condemned twice by the ECtHr and one of the applicants after his repeated conviction submitted a constitutional complaint. The judgment of the ECtHR was considered to be a 'new fact' that prompted fresh examination of the constitutionality of the relevant provision of the Criminal Code. In the hostile political climate, CCt seems to have taken a step back:

> *The judgment of the EurCtHR is declarative, it does not mean directly the change of the legal questions, but it may assist [the CCt] in interpreting and defining the content and scope of the constitutional rights. (...)*

The decision while repeating that the Convention case-law sets the minimum level of protection, added a sovereignist note: the domestic law remains free to set "a different, higher set of standards" in the field of human rights.

While the number of decisions where the CCt repeatedly included reference to principle of interpretive priority suggests growing consciousness of the importance of the Convention case-law, the CCt only gradually increased its importance. In procedural rights cases, the CCt – in line with its former position – has traditionally laid more emphasis on the Article 6 jurisprudence and the decision on impartiality elegantly incorporated the Convention standards in the interpretation of the FL. Interestingly, the ECtHR's influence has become decisive in freedom of expression cases as well, where for a long time the CCt afforded higher level of protection, the CCt – similarly to the procedural rights – accepted that the Article 10 standards form part of the FL's rights protection.

Not surprisingly, the judgments delivered in cases against Hungary prompted a significant shift in the CCt's approach as Article Q of the FL excludes the possibility to consider solutions that were previously found to be in violation of the Convention constitutional. When re-examining the 98% tax after the ECtHR's condemnation, the CCt reiterated that the violation of international commitments results in direct unconstitutionality as "it contradicts not only with Article Q (2) (...), but also with Article B (1) guaranteeing the rule of law." The same line of reasoning was followed in the decision on the church law, the judgment of the ECtHR resulted in violating international treaties.

Despite the promising developments, the CCt remains divided on the authority of the Convention jurisprudence. Some draw attention to the inherent differences between the mandate of the two courts, others raise concerns about the individualistic approach the EurCtHR follows. The disagreement among the justices on the role of the EurCtHR jurisprudence is not simply a theoretical debate, it has very significant consequences in cases where the CCt disregards the Convention standards as it happened in the case on the re-distribution of tobacco licenses – the procedure was deemed constitutional at home and found to be in violation of the Convention in Strasbourg. Although the judgments are generally complied with, it is rather peculiar that all the emblematic measures of the Government are condemned by the ECtHR. The thorough examination of the CCt's jurisprudence indicates that the progressive attitude towards the ECHR largely depends on the presenting justice's personal conviction, and it is yet to be seen if the practice gets consolidated after the election of the new justices.

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