A Problem of Progress in the European Convention of Human Rights

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Abstract: In the current article author tries to focus on a problem of progress in the European Convention of Human Rights. **Objectives:** The main objective is to discover how the idea of progress, contained in numerous international legal sources, is reflected in a recent case-law of ECtHR. **Prior Work:** Regardless the fact, that there have been published tens of works dedicated to the concept of progress in the public international law during the last decades, none of them has been targeted on currently investigated issue. **Approach:** Firstly, the author analyses particular international treaties and tries to evaluate their inspiration by the idea of progress. Subsequently, he finds the reflection of this general idea in the current decision of ECtHR in case of N.K.M. v. Hungary. **Results:** By the comparison of the codified progressivistic inspirations and their reflection in the analysed case he finds out that this idea has transformed from general statement to assessment criterion with somehow modified content. **Implications:** By this observation he demonstrates the general tendency of the court to increase its interventionism on expense of a margin of appreciation of the member states. **Value:** By doing so, he does not just warn of rather dangerous movement in ECtHR case-law, but also offers certain methodological sample, how to detect similar tendencies.

Keywords: progress; European Convention on Human Rights; interventionism; principle of subsidiarity; margin of appreciation

1. Introduction

A faith in progress is one of the fundamental parts of "humanistic credo" introduced by the French Revolution, which is dominating up to our days. Simple premise that mankind deserves to live in better way like is living nowadays, is persisting and has found reflection also in numerous international legal documents (Skouteris, 2008, pp. 2-9), and in numerous pieces of legal literature (Wheaton, 1841; Renault, 1912; Bieligk, 1945; Fenwick, 1952; Chruschev, 1959; Beddard &

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Hill, 1992; Gillespie, 2001; Goldstone & Kelly, 2006). In this short essay we will try to focus on different perception of progress in concrete international human rights codifications and their correlation with a social and economic reality of the post-crisis situation in Europe. After that we will analyse the ECtHR case N.K.M. v. Hungary, where we will try to find out, whether the application of international law in the concrete case is in tune with the scope established by the written international law. In the last chapter we will confront the conclusions of previous two chapters and formulate some final conclusions.

2. Concrete Aspiration or General Desire?

Our analysis of the notion of progress in various sources of international law will start with a simple distinction. Does the progress mean general desire of the mankind to achieve better living conditions, which should enable them to live better and happier lives, or does the progress mean the concrete answer on certain actual question of a social regulation? The problem may be also re-formulated in following way: Does the notion of progress, which is used in basically all important modern legal documents, reflect just a "provenience of inspiration" or does it have a concrete legally enforceable content, which would provide somebody with additional rights and correlatively would impose more duties on states?

We have chosen this basic distinction because of its high relevance in the current post-crisis European situation. After the break out of the European economic crisis and as a result of fiscal consolidation in many EU countries, there occurred quite unique and unprecedented situation: after the decades of prosperity and "progressive" growth of a net income of individuals as well as their social security, there appeared the pressing need to decrease state´s expenses on public sector salaries and a social security system. Whereas the progress is one-way movement from lower standards to higher, the decreasing of living standards is not "progressive" in any way. Thus is created space for argumentation, which founds any substantial lowering of economic benefits of certain groups illegal, because of its "non-progressiveness". Therefore a proper identification of the meaning of progress is crucial to understand, whether such constructions are based on wording and spirit of international law, or they are just excessive claims of certain ideology, which is only misusing an abstract language of international conventions and other sources of international law.

3. Progress in the European Convention and in other Related Documents

The European Convention of Human Rights and Fundamental Freedoms (ECHR) contains no direct reference to progress in its text. From a substantial point of view, only the preamble of the ECHR and of some of its protocols comprises some slight references to an idea of general progress reflected in a democratic form of government and following of therein contain human rights. Thus we can conclude that ECHR is written in rather neutral manner.

However, the Convention is "considering" the Universal Declaration of Human Rights (UDHR, 1948, Preamble), which is written in very progressivist language (Steiner & Alston, 2008). The preamble contains two *expressis verbis* references to *"social progress and better standards of life in larger freedom"* and *"progressive measures"* taken to ensure respect for these rights and freedoms. In addition to that, the UDHR contains expressions like *"advent of the world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want"*, *"the highest aspiration of the common people"*, *"faith in fundamental human rights"*, *"a common standard of achievement for all peoples and all nations"* etc., which indicate very strong believe in certain values (human rights) as well as the strong faith that those values are universal and progressive.

Similarly, we can find some signs of progress in the Preamble of the International Covenant on Civil and Political Rights (ICCPR, 1966). The state parties recognized that *"the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights"*. This clause indicates not only conviction of signatories about ensuring of human freedom via concept of civil and political rights, but also recognizes, that economic, social and cultural rights are essential in order to achieve the ultimate purpose – a human freedom. This fact is of the eminent importance, because the linkage between political freedom and social and economic rights has been established at the global level. Therefore the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966) has an impact on extent and assessment of rights, which are traditionally considers as civil or political. However, the ICESCR is not only relevant, but also extremely progressivist. In 31 articles it contains 9 direct references to the concept of progress both in the context of general (Articles 2, 15, 18, 21 and 22) and concrete (Articles

13 and 14) obligation of signatories to implement the Covenant in a progressive manner.

The linkage between civil and political rights on a one hand and social, economic and cultural rights on other is also reflected at the European level. Traditional approach, which is based on the division between those two branches, is nowadays relativized, and the social rights are enforced by European Court of Human Rights (ECtHR) through formal "carrier" of a general principle of non-discrimination[1], or abstract principle of fairness or legal certainty.

In order to answer the question from the previous chapter, it is more than obvious that the concept of progress, as used in abovementioned sources of international law, is almost exclusively constructed as general aspiration to upgrade living standard of people and therefore cannot, *per se*, create any ground for admitting additional rights to individuals in concrete decision-making. Even in instances, where the progress is formulated in concrete terms (like the Articles 13 and 14 of the ICESCR), is the direct intervention to financial policies of states unacceptable, because of their wide margin of appreciation.

4. Case N.K.M. v. Hungary

Despite the fact, that European Court of Human Rights (ECtHR) holds rather reserved position towards a massive interference to fiscal matters of member states of the Council of Europe, there appeared some exceptions from this general line. For example, one very recent case N.K.M. v. Hungary (No. 66529/11) was decided in favour of an applicant, who contested excessively disproportionate rate of taxation imposed on her severance payment. The ECtHR has founded that the interference to "legitimate expectations" of the applicant´s possession had occurred (par. 34-35). Let leave the question of a legitimacy of the ECtHR interference to fiscal matters of the member states untouched, despite it is extremely interesting, and focus on the concept of legitimate expectations and its role in this case.

The dispute was based on excessiveness of special (indirectly) retroactive 98% tax imposed on severance payment above certain threshold introduced by the act of the Hungarian Parliament (par. 9). The act was justified by public morals and bad budgetary situation in the situation of European economic crisis. It was declared unconstitutional, but latter modified and re-introduced (par. 17). The applicant filed

[1] See Case Broeks v. the Netherlands (Communication No. 172/1984) (1987).

the case to ECtHR on the basis of unjustified deprivation of property rights, which are protected by the Article 1 Protocol No. 1 (par. 23). The court has surprisingly accepted the complaint despite the objection of the government that the tax has not been imposed on a possession in strict sense of the word (par. 26). The court held that *"a legitimate expectation of obtaining an asset may also enjoy the protection of Article 1 Protocol No. 1"* (par. 35) and that in the present case the severance payment fall within its scope. According to the court, the civil servant may legitimately expect that compensation for performed work and loyalty will be fulfilled following the original contract and those government undertakings cannot be taken aside without appropriate reasons (par. 38).

With regard to concrete assessment of the case circumstances we have to mention that the court considered the interference to the property rights of the claimant as lawful (par. 50, 54) and in public interest (par. 59). However, it was not proportionate, whereas *"those who act in good faith on the basis of law should not be frustrated in their statute-based expectations without specific and compelling reasons"* (par. 75), which were not found in this case. Therefore the violation of the Article 1 of the Protocol 1 has been committed and compensation awarded to the claimant.

Why is this case interesting from a view-point of the question of our interest? The court dared to interfere to sovereign rights of the parliament of the member state without any strong legal basis except of rather vague proportionality test. Why the court considered 52% total tax rate as too severe interference to one´s "legitimate expectations" of property rights? The court alleged that *"tax burden of 52% exceeds about three times the general personal income tax rate of 16%"* (par. 68), and by the fact that there is no another similarly high tax rate, it is too excessive. On the other hand the court itself pointed out that even 75% personal income tax rate is acceptable in some signatory countries, however such *"rates are usually applicable only to the highest income brackets, related to the revenues clearly exceeding the amount that is contemplated in the context of the Hungarian statutory severance"* (par. 65).

Let not see the marvellous adjective "usually" and concentrate on the substance of this statement. The court numerically compared the threshold of the highest income rates in the countries with a high tax rates and came to the conclusion that they are substantially higher than those in the present Hungarian case. The conclusion is at the end not surprising at all, because such high tax rates are usually applied in Nordic countries, where the gross income is also enormous. Thus such numerical

comparison is not relevant at all. In addition to that the court did not deal with the argument of the budgetary crisis in Hungary and impacts of the severance payments on consolidation efforts of the Hungarian Government.

Regardless the court did not mention the term "progress" in this case explicitly, it is strongly presumed. The legitimate expectations, as used like in the current case, are just a Trojan horse containing a progressivistic faith in continual growing of material welfare and living conditions of the people. The people are entitled to expect that the living standards will not decrease significantly regardless the economic determinants, which are standing behind the genuine material prosperity of society.

5. Movement towards Practical Applicability of the Idea of Progress in Economic Matters (conclusions)

In order to sum up previous two chapters, we can conclude that the idea of progress, which is set out in numerous sources of the international law, is transforming from general aspiration to create better world for people to criterion of assessment of correctness of concrete economic measures, which interfere to property rights of individuals.

The faith in progress is so strong, that it has overridden the principle of subsidiarity (the best place for examination of economic measures is lower unit, in our case the state, than a higher) and the principle of democratic legitimacy (a parliament is sovereign in financial matters). This interventionism and paternalism may have serious impact on proper application of the international law on one hand, and functioning and legitimacy of democratic government on the other. Therefore the notions contained in written law should be interpreted more strictly and less proactively by the court in order to interpret them in adequate manner. Otherwise, the judges may declare their faiths and prejudices to be law and democracy will change to the rule of judges (oligarchy).

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