
КОНСТИТУЦИОННОЕ И МЕЖДУНАРОДНОЕ ПРАВО

КОНСТИТУЦИЯЛЫҚ ЖӘНЕ ХАЛЫҚАРАЛЫҚ ҚҰҚЫҚ

UDC 341+348

Andrzej Bisztyga

Katowice School of Economics, Poland (E-mail: ambisz@interia.pl)

Hope for coexistence. European jurisprudence towards islam

The area of both the European Union and the Council of Europe is inhabited by a considerable and still increasing number of Islam believers. We are facing a new and growing phenomenon of either a meeting or a clash of two cultures. This entails a question of the European — judicial dimension of the contact of the two major religions: Christianity and Islam and also on the grounds of different cultures. The author raised the problem against the backdrop of the case-law of the European Court of Human Rights which involves the Islamic aspect. Analysing selected judicial decisions of the ECHR, the author indicates the existence of an interesting research problem and attempts to formulate an appropriate solution.

Key words: human rights, Islam, European Convention on Human Rights, European Court of Human Rights.

When we talk about European integration we mean first of all the process of rapprochement within the framework of European structures of the EU, which is mainly — but not exclusively — strengthening the bonds of economic nature. It would be wrong, however, if the idea of European integration was narrowed merely to this level. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) as well as the jurisprudence of the European Court of Human Rights (ECourtHR), appears to be an effective instrument of a different type, but of not less importance. The existing activity of the European Court of Human Rights, deciding on violation or non-violation of any of the conventional rights or freedoms, proves the existence of common European identity. Moreover, the control system established by the System, does confirm and shape this identity on a mutual basis, naturally, mainly in the sphere of law and legal culture.

The system of the protection of human rights springing from the ECourtHR is the most effective system among international law systems. Its centre, a sort of pearl in the crown of the ECHR is the ECourtHR. Its jurisprudence relatively deeply interferes the legal systems of the Convention Member States, which results in real subjectification of an individual within the framework of international law procedure of the protection of his rights.

In the evolving social reality, the European Court of Human Rights comes to face new phenomena or it encounters in its practice a phenomenon of intensification of certain categories of phenomena. As the citizens and residents of the states under the jurisdiction of the ECourtHR include also Islam believers, in many different aspects the Court also comes to hear cases in which Islam is the background. The aim of this article is to signal the presence of Islamic threads in European jurisprudence, i.e. in the jurisprudence of the European Court of Human Rights.

It is estimated that 27 EU Member States are inhabited by approximately 12–13 million Muslims. It is ascertained that approximately 10 per cent of the population of France account for Islam believers, and in Germany there are about 4 million of them. In the case of 47 Member States of the Council of Europe the situation looks completely different. In this case the number of Islam believers is far bigger than in the EU. It is so, first of all, due to Turkey with its population of 70 million inhabitants. The vast majority of the population is Muslim. The jurisdiction of the European Court of Human Rights covers communities and as a consequence, individuals, diversified in terms of religion as well as culture.

The question is raised then concerning the European, judicial picture of the meeting of two major religions and cultures on grounds of the Council of Europe. Should we talk about a meeting of two cultures or is it rather a clash of them? What influence on the subject matter of the ECourtHR case-law is exerted by the considerable Muslim presence within the area of the Council of Europe states? What is the European, juridical dimension of the meeting between Christian-Enlightenment Europe and Islam? This problem occurs with a very diverse intensity in particular Member States of the Council of Europe. Typically, in reference to the inhabitants in Poland it does not carry as considerable a charge as it is the case in reference to people living in France, Germany or Turkey, but certainly does concern Polish people as Europeans under the jurisdiction of the Strasbourg court and EU citizens. Hence, I propose to monitor this type of jurisprudence of the European Court of Human Rights.

The problem is even more significant as on the grounds of the Convention the individual is an entity equipped with entitlements of an international law nature, of which the consequence is the definite departure from the traditional conception of state sovereignty as exclusive control of state power over the individual. I remind this truth in order to emphasize the fact that in the question under discussion the European Court of Human Rights is the creator of the European standard of human rights and that their dynamic interpretation of the Convention is a constitutional act regulating the European public order.

I believe the Islamic threads manifest themselves especially in judgements regarding freedom of thought, conscience and religion (Article 9 ECHR), freedom of expression (Article 10 ECHR) as well as freedom of assembly and association (Article 11 ECHR). Moreover, sometimes the values protected by such conventional norms are juxtaposed.

I will concentrate on selected, I believe representative Strasbourg judgements of which the delivery was motivated by Islam issues, and consequently, on decisions containing a religious — Islamic — aspect. In my opinion wider considerations on this issue should be led in parallel. Their first thread focuses on Strasbourg jurisprudence being the result of complaints sent from the states of «old Europe». I considered Germany to be a state which is representative for the «meeting of cultures» effect. However, the second thread of my considerations will concern the jurisprudence of the ECourtHR towards Turkey, as a state in which 95 per cent of population account for Islam believers and where in force is a constitutional principle of state secularism (Article 2 Constitution of Turkey of 1982). Due to limited scope of this study I will refer to one case for each of the threads.

As far as the first thread is concerned, an example of the case in manifested itself open contradiction between the radically interpreted sharia law and the assumptions of the European liberal democracy is the case *Kalifatstaat v. Germany* of 2006. The applicant association of Islamic communities in Cologne, Germany adopted the name of Kalifatstaat in 1995 and its leader, the association's former chairman's son, declared himself caliph. Kalifatstaat determined its aims concerning Turkey. The aims they pursued were the following: replacing secular political institutions with an Islamic regime based on sharia law, and consequently seeking to establish a caliphate in Turkey. The Kalifatstaat association considered democracy to be overtly incompatible with Islam and had openly advocated the use of violence in order to achieve its goals. In 2001 the German Federal Interior Ministry issued an order banning the Kalifatstaat association on the grounds that its aims and actions were contrary to constitutional principles and that it represented a threat to national security. This administrative decision was upheld by German courts.

The complaint of the Islamic association was considered by the Chamber of the ECourtHR composed of 7 judges to be inadmissible. Thus, the ECourtHR fully supported the restrictive view taken by the German courts on this matter. The Strasbourg court held that restricting freedom of association was in this case justified because of the association rejecting the principles of democracy and rule of law as well as the fact that they publicly advocated the use of violence in order to attain its political objectives.

Regarding the Turkish *sensu stricto* thread, the constitutional principle of secularism constitutes an absolutely inalienable principle of the Turkish legal system, i.e. by virtue of the Constitution of the Republic of Turkey itself, it is not subject to modification. Turkish style constitutional secularism was meant to be similar to the French model of shaping the relations between state and religious unions and thus it is based on the model of so called hostile separation. According to the model, religion belongs solely to the sphere of privacy, a contrario, any matters related to it should be excluded from the public sphere. On such assumption, religious unions function in the legal transactions as associations. These unions are subject to scrutiny on the part of the state which is neutral to religious convictions.

A landmark case against Turkey with a clearly outlined Islamic background is the *Leyla Shahin* case. The case regarded wearing the Islamic headscarf, and thus also the question of visibility of Islam in public.

Leyla Shahin was a medicine student at Istanbul University, where she wore the headscarf. For this reason, under the provisions prohibiting women wearing headscarves and in order to guarantee secular atmosphere at university, the faculty began disciplinary proceedings against her. After eighteen months of legal wrangles aiming at getting recognition of the right to wear attire in accordance with how she conceives religious duty, Leyla Shahin quit studies in Turkey, continuing them at Vienna University where she could wear and did wear the headscarf. Nota bene, it is a peculiar paradox that she could not wear the headscarf at Istanbul University and she could wear it at Vienna University.

This resounding case rose to a symbol and arena for political fight between the defenders of secular democracy in Turkey, advocating the implementation of a decisive ban of visible forms of expressing religion in public, and are in favour of admissibility of manifestations of religion (Islam) in this sphere.

Deciding in this case, the ECourtHR upheld the position of Turkey. The ECourtHR quoted the doctrine of the state's margin of appreciation and in this context it referred to the constitutional principle of the state secularism. In the view of the ECourtHR the ban on wearing the Islamic headscarf on the premises of a Turkish university is justified by the protection of the constitutional principle of secularism, conceived as a guarantee of democracy and safeguarding against a possible progress of Muslim radicalism in Turkey. To be specific, the ECourtHR held that the policy of opposing wearing religious attire on the premises of a university is necessary in a democratic society and as such is compatible with Article 9 para. 2 ECHR. In other words, this policy is an admissible forum externum inference with the right to freedom of religion.

Additionally, the attempts made in 2008 at amending the law aiming at legalizing wearing headscarves were considered by Turkish Constitutional Tribunal unconstitutional. In February 2008 Turkish Parliament, by a vast majority of votes introduced a constitutional amendment allowing for wearing headscarves at university. But this modification was also qualified by Turkish Constitutional Tribunal as unconstitutional due to its violation of the constitutional principle of secularism of the state.

Summing up, especially in the last decade, the Strasbourg court touched upon Islamic issues in a considerable number of judgements. In my opinion, the approach of the ECourtHR did not basically divert from its approach to other denominations, including Christian religion. The emphasised in the ECourtHR case-law need of equal treatment — i.e. without favouritism and discrimination — of different religions and denominations, enjoys support from domestic constitutional courts and opinions of the world of science. The marked for the sake of the principle of equal treatment line of jurisprudence of the ECourtHR in cases including Islamic threads, does not divert from similar cases regarding other religions. It must be, however, stressed that a certain exception is Turkey whose constitutional principle of secularism is treated by the ECourtHR in terms of local margin of appreciation.

The jurisprudential picture of the meeting of both cultures: European and Islamic is composed of statements made by the ECourtHR regarding the relations between some elements of the Islamic religious message and the assumptions of European democracy. Typically, in the case *Refah Partisi* of 2001 the ECourtHR ascertained that the establishment of sharia law as a political system is incompatible with the fundamental principles of democracy protected by the ECHR. It is especially difficult to declare respect for democracy and human rights and at the same time support a system based on sharia law, which is far off the values guaranteed by the Convention. It concerns in particular criminal law and criminal proceedings, provisions on the legal status of women and the way all spheres of private and public life is interfered in relation to religious commands.

Seemingly, the core of the discrepancies signalled by the ECourtHR is a certain incomplete compatibility of the individualistic concept of individual freedoms and rights and the Islamic concept of individual rights. The Islamic concept of individual rights seems to be not fully compatible with the one which is specific to our cultural circle, the individualistic concept of individual freedoms and rights, according to which a human being is an autonomous entity and the source of his freedoms and rights is an inherent and inalienable dignity. This concept finds its normative expression among others in the Conventional catalogue of individual freedoms and rights. Islam, however, puts greater stress on the individual's duties towards the community than — on what is specific to the closer to us concept of freedom — individual freedoms and rights which should be protected against unlawful acts of the state. In other words, sharia law is based on the idea of duties imposed on man, and not on the concept of his inherent rights. In Islam religious norms constitute a foundation of timeless natural order, subordinating the individual's will to Allah.

The non-identity of both concepts of the individual, in the area of their freedoms and rights results in discrepancy in the way one approaches a number of matters. This discrepancy reveals in the form of dissimilarity in the approach to women's rights, using inhuman punishments or in the area of religious freedom and

freedom of speech. Nevertheless, one may hope for gradual removal of such discrepancies. One must also take into consideration the fact that there are diversified streams within Islam, including those less categorical, which may offer some hope for rapprochement. In Europe we find many, conciliatory Muslims accepting that human rights in their European and conventional sense, secular political order and the principle of rule of law have Islamic legitimacy and are entirely compatible with sharia law. Perhaps this phenomenon may be seen as Muslims' gradual acceptance of the Western idea of human rights. This gives hope for coexistence and convergence.

I think that for the sake of peaceful coexistence and reconciliation of Islam with European values, it would not be advisable to emphasise and label human rights as solely Western values, which ought to be accepted by Islamic community residing in the Member States of the Council of Europe. I would put it another way. Islamic communities within the jurisdiction of the ECourtHR are in with a chance of deriving such values from their own tradition and culture. It may not, however, mean the values being replaced with apparently Islamic norms. On the contrary, the point is to enable these communities to make the content of human rights take roots in their cultural heritage and tradition in an autonomous way, with respect for the *acquis constitutionnel* of the ECourtHR. Islam does not constitute a monolith, therefore especially less radical streams of Islam bid fair to acquire components of the European concept of individual freedoms and rights as expressed in the jurisprudence of the ECourtHR.

References

- 1 Alaoui F. *Muzułmanie w Europie*, [in]: K.Górak — Sosnowska, K.Pędziwiatr, P.Kubicki: *Islam i obywatelskość w Europie*, Warszawa 2006, p. 85.
- 2 Tibi B. *Euro-islam jako europejski most między cywilizacjami*. Europeizacja islamu, [in]: Ibid, p. 14.
- 3 Garlicki L. *Wprowadzenie*, [in]: L.Garlicki (ed.): *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz do artykułów 1–18*, vol. I, Warszawa 2010, p. 5.
- 4 Kalifatstaat V. *Germany, 11 December 2006, admissibility decision № 13828/04*.
- 5 Dumont P. *The Origins of Kemalist Ideology*, [in]: J.M.Landau (ed.): *Ataturk and the Modernization of Turkey*, Westview Press, Boulder, E.J.Brill, Leiden 1984, p. 35, A.Szymański: op.cit., p. 23.
- 6 Leyla Shahin V. *Turkey, 26 March 2004 (Chamber) and 10 November 2005 (Grand Chamber)*.

Андрей Бистуга

Бірігіп өмір сүру үміті. Еуропалық юриспруденция және ислам

Еуропалық одақ пен Еуропа кеңесінің территориясында ислам дінін ұстанатын адамдар көбейіп жатыр. Біздің алдымызда жаңа дамып келе жатқан құбылыстың дамуы әлде екі мәдениеттің қалыптасуының көрініс алып отыр ма? Осыдан Еуропа елдерінде сот істерін екі басты дінге және әр түрлі мәдениеттерге сүйене отырып қарастыру ойластырылып жатыр. Автордың көтеріп отырған мәселесі — Адам құқықтары жөніндегі Еуропалық соттың (АКЕС) прецеденттік құқығы. Мақалада АКЕС-тің соттық шешімдеріне байланысты қателігі көрсетіліп, шешу жолдары ұсынылған.

Андрей Бистуга

Надежда на сосуществование. Европейская юриспруденция по отношению к исламу

В статье рассмотрены вопросы развития двух основных религий: христианства и ислама. Акцентировано внимание на исламском аспекте, на распространении его влияния на европейском пространстве. Подняты вопросы взаимодействия и взаимосвязи, их правовое регулирование, возможности сосуществования, направленные на обеспечение прав человека, личности. Раскрыты роль и значение Европейского суда по правам человека при регулировании правовых отношений с обществом и государством в предоставлении права на свободу вероисповедания.