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AMERICAN MODEL OF CONSTITUTIONAL JUDICIAL DIALOGUE: EICHIN AND ANTILLEF BEFORE THE CONSTITUTIONAL COURT OF CHILE

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Vatamaniuk A.V. American model of constitutional dialogue: in the cases of Aikhin and Antilef before the Constitutional Court of Chile.

For a long time, public law was predominantly subordinated to the norms established by national legislation, and therefore did not want to be studied in comparative jurisprudence, as the dominant importance of law within legocentric models made public law a radically national field of study. In constitutional law, the most emblematic and therefore most widely studied uses are, but are not limited to: transnational judicial dialogue, 'the migration of constitutional ideas and the technique of transplants or constitutional loans'.

Of these various uses, however, transnational judicial dialogue is perhaps the technique most often employed by a constitutional judge. It has been repeatedly used as a tool to provide reasoned support for the position taken by the majority, as well as to support a vote that deviates from the majority position.

The judicial dialogue of the Constitutional Court with international courts is not limited to judicial decisions. From the outset, the Court also engages in dialogue with documents issued by bodies of the Inter-American human rights system that are less binding than judicial convictions, which are considered recommendations of international bodies, such as advisory opinions of the Inter-American Court and Commission and recommendations of the Committee on Freedom of Association of the International Labour Organization. In the case of dialogues between constitutional courts, this can be presented in different ways when a judge raises the issue of a foreign constitutional model and how it works in comparative constitutional justice decisions. It also arises when the Court refers to a decision or a line of decisions of a foreign constitutional court in its argumentation, offering it as a contribution to the domestic constitutional debate. Usually, the decision with which the Constitutional Court establishes a dialogue belongs to the countries of historical reference, be it the decisions of the US Supreme Court or the constitutional courts of Germany, France, England or Spain and, although to a lesser extent, the research also showed references to Latin American courts.

Key words: judicial dialogue, constitutional courts, European Court of Human Rights, court decisions, reasonableness.

Ватаманюк А.В. Американська модель конституційного діалогу: у справах Ейхіна та Антілефа перед Конституційним судом Чилі.

Публічне право тривалий час переважно підпорядковувалося нормам, встановленим національним законодавством, і тому не бажало досліджувати його в порівняльному правознавстві, оскільки домінуюче значення права в межах легіцентричних моделей зробило публічне право радикально національною сферою дослідження. У конституційному праві найбільш символічними і тому найбільш широко вивченими способами використання є, але не обмежуються ними: транснаціональний судовий діалог, «міграція конституційних ідей і техніка трансплантатів або конституційних позик».

Однак з цих різноманітних застосувань транснаціональний судовий діалог є, мабуть, технікою, яку найчастіше використовує конституційний суддя. Він неодноразово використовувався як інструмент аргументованої підтримки позиції, яку займає більшість, а також на підтримку голосування, яке відхиляється від позиції більшості.

Судовий діалог Конституційного Суду з міжнародними судами не обмежується судовими рішеннями. З самого початку Суд також веде діалог з документами, виданими органами Міжамериканської системи прав людини, які мають меншу обов'язкову силу, ніж судові обвинувальні вироки, які розглядаються як рекомендації міжнародних органів, такі як консультативні висновки Міжамериканського суду і комісії та рекомендації Комітету з питань свободи асоціації Міжнародної організації праці. У випадку діалогів між конституційними судами це може бути представлено по-різному, коли суддя порушує питання зарубіжної конституційної моделі та способу її дії у рішеннях конституцій-

ної юстиції порівняльного зразка. Він також виникає, коли Суд у своїй аргументації посилається на рішення або течію рішень іноземного конституційного суду, пропонуючи його як внесок у внутрішні конституційні дебати. Зазвичай рішення, з яким Конституційний суд встановлює діалог, належить до країн історичної довідки, будь то рішення Верховного Суду США або конституційних судів Німеччини, Франції, Англії чи Іспанії і, хоча в меншій мірі, результат дослідження також показав посилання на латиноамериканські суди.

Ключові слова: судовий діалог, конституційні суди, Європейський суд з прав людини, судові рішення, обґрунтованість

Problem statement. This study analyses the phenomenon of judicial dialogue, its main characteristics, types and purposes in the field of human rights protection, as well as how the Constitutional Chamber of the Supreme Court of Justice has expressly used jurisprudence from the Inter-American Court of Human Rights in some of its judgments and vice versa, in order to determine the existence of a judicial dialogue.

The main purpose of the study is to analyse the research aimed at investigating the evolution and role of constitutional jurisdiction in the implementation of constitutional norms, the observance of judicial activism and the use of institutional dialogues in the procedures for the implementation of fundamental rights. It is assumed that adequate interaction in a consultative rather than simply adversarial manner between the state powers provides better answers to questions relating to fundamental rights.

State of development. The issue of judicial dialogue in the national context is studied by O. Shcherbaniuk and S. Shevchuk. The research is based on the works of international scholars and judicial decisions of constitutional courts.

The main material is presented in the article. Since the Constitution is the highest in rank and more important for the state than other laws, its creation and amendment are subject to special requirements, which are usually defined in the constitution itself. These requirements can take different forms and shapes and differ in each country in order to ensure the stability and protection of the constitutional order, national security and territorial integrity and constitutional rights and freedoms of the individual. Therefore, the constitutional court i s important in the mechanism for protecting the constitution. The presence of a centralized system of constitutional control has advantages. One of the advantages is a unified judicial decision, since no court, except the constitutional one, has the authority to review legislation that, in its opinion, contradicts the constitution; contradictory judicial decisions of different instances are impossible (unlike in a diffuse system). Since only one court can decide on the constitutionality of laws, there is greater legal certainty than in a diffuse system [4].

Judicial dialogue is one of the most topical issues in universal constitutionalism[5]. Since the mid-1990s, the first studies of global constitutional law have highlighted the growing role of constitutional judges as protagonists of legal circulation, through the use of extra-systemic arguments or the increasingly frequent reference in judgments to international human rights law and judgments of other constitutional courts or tribunals.

Judicial dialogue is in effect a dialogue between interpreters and between different interpretations, which shows the importance of comparative law and legal argumentation, whereby the basis of what is decided lies in the motivation, in its ability to convince other judges and operators. This requires the existence of at least two interacting actors and can of course be extended to a three-dimensional or multidimensional sphere. It is therefore necessary that there be reciprocity in the interaction, i.e. that the jurisprudence of a given Constitutional Court, Chamber or Tribunal be used by another constitutional, conventional or supranational jurisdiction, and vice versa, otherwise there would only be a unidirectional influence, i.e. a monologue. It is not measured in quantitative terms, i.e. that there must be a minimum number of judgments cited or that they deal with the same subject matter, because in relation to the latter, practice shows that interaction in most cases occurs on different topics.

Dialogue - and this seems a logical requirement - is only possible when there is a shared language. And this shared language has to do both with a self-understanding of the judge, as a participant in a global and common enterprise, and with the existence of this community around certain contents, which after all are human rights, a community which, in order to exist, must be the result of overcoming the distinction between judges who 'give' and judges who merely receive [3].

The phenomenon, known as vertical dialogue, is that which takes place between jurisdictions with different hierarchies, i.e. it occurs in the interaction between national courts and conventional or supranational jurisdictions, and can be top down or bottom up. Indeed, within the legal system of a supranational organisation, in which, alongside state courts, there are tribunals provided for by an international treaty, which are granted more or less incisive powers of intervention, the relations between jurisprudences are necessary and it is inevitable to clarify the reciprocal spaces of intervention.

In the Inter-American Protection System, the States that have accepted the contentious jurisdiction of the Court of San José must abide by its judgments, as these have direct and indirect effects depending on whether the case has been processed and the responsibility of the State has been determined, which shows how the constitutional jurisdictions are linked to the interpretative guidelines of the Inter-American judge, but at the same time, the latter must draw on these to expand the content of the rights recognised in the American Convention and other instruments that make up the parameter of conventionality. This is why the relationship between the constitutional and conventional jurisdictions should not be seen in terms of hierarchy, but rather in terms of which of them offers the highest level of protection [1].

In 2014, the Constitutional Court of Chile issued two rulings declaring the inapplicability of military justice on the grounds of unconstitutionality in cases involving civilian casualties or whose circumstances indicate that they constitute a common criminal offense. In both cases, the Court based its arguments on numerous references to both traditional international human rights law and the jurisprudence of the Inter-American Court of Human Rights (IACHR Court). From these examples, the following questions arise: can these cases be considered a demonstration of the leading role of a judge under the prism of a new legal paradigm? Can these cases be a demonstration of the potential growth of the role of the constitutional judge in the context of the emergence of a new public law? Is there a dialogue between judges in these cases? Our position is that the recent decisions of the Constitutional Court of Chile concerning the competence of military justice are an example of what can be called a change in the legal paradigm, especially in the constitutional sphere. Such a paradigm shift would have against the background of the slow emergence of a new public law, as well as a characteristic feature – the leading role of the judge and a multi-level interjudicial dialogue.

The different modalities of dialogue are presented under the protection of the interpretation of human rights. That is why different types of dialogue are translated into different types of interpretation. Our initial position is that the Chilean constitutional judge in the Eikhin and Antilöf cases carried out a specific type of dialogue and, therefore, resorted to a certain variety of interpretations from which it will be analyzed. In other words, Eikhin and Antilef would be two examples of the reality of this dialogue between judges in the Chilean constitutional order. In this work we will try to provide a theoretical context for the experience derived from Chilean constitutional practice in the cases mentioned.

The exchange or discussion of reasoning or argumentation naturally requires the exercise of interpretation by the internal judge. This exercise, as we have already warned, is transmitted both in Europe and in America, mainly through the control of conventions. Thus, the methods of interpretation accumulated by a full-time judge in exercising control over conventionality are fundamental for the development of dialogue between judges. The dialogue between judges and the various forms of interpretation that it entails is approached mainly by the European doctrine based on everyday experience, especially from interaction with the European human rights system. The Judges' Dialogue covers different modes of interpretation in the field of human rights, such as neutralization of interpretation and appropriate interpretation [2].

In the cases of Eikhin and Antilef before the Constitutional Court of Chile, constitutional judges use international human rights law and inter-American jurisprudence as support and encouragement to accept the majority vote. Both cases imply a change in judicial practice regarding previous decisions of the Constitutional Court in this matter. The Eikhin case is a motion for inapplicability that focuses on criminal proceedings for serious injuries in which police officers were shot during a peaceful demonstration for education, and such a shot affected and meant the loss of Enrique Eihin Zambrano's right eye. In this case, in a decision of May 6, 2014, the Constitutional Court pointed out the unconstitutionality of military jurisdiction, in cas d'espèce. It is constitutional jurisprudence regarding military jurisdiction when the victim is a civilian. The majority decision in the Eikhin case repeats the doctrine and criteria set forth by Justices Hernán Vodanovich, Francisco Fernández, Carlos Carmona, Gonzalo García and Juan José Romero in the case of Francisca Yorker Correa, case No. 2363-2012, judgment of January 14, 2014.

It should be noted that the Yorker case, before the Eihin case, refers to a general criminal process that began as a result of the physically annoying and humiliating treatment received by the Chilean carabinieri – Chilean police officers – after she was detained during the day of mobilization on August 23, 2012. The case under consideration, in which the claim for inapplicability was initiated, is an appeal of the court, in which the court of guarantees recognized itself as incapable in favor of military justice for the crime of unlawful restrictions and torment.

In turn, the Antiléf case concerns Marcos Antilef, a carabiniero who was the victim of unpleasant treatment, injuries and illegal restrictions - which qualify as torture - by other carabinieri in the territory of the Carabineros prison in Palmilla. The guarantor judge declared himself incapacitated and sent the

case to military courts. The application for inapplicability seeks a declaration of unconstitutionality of Article 5(3) of the Code of Military Justice, which confers jurisdiction over common crimes, for violation of Article 5(2); 19, paragraph 3, paragraph 6; and 83 of the Constitution. It is the constitutional jurisprudence that calls the carabinieri a victim.

It should be noted that in cas d'espèce, Chilean constitutional elaborations on documents and interpretations coming from international jurisdictions position the constitutional judge as an ordinary human rights judge who interacts with an international source, while exercising control over conventionality.

The Constitutional Court in the Eikhin case expressly assumes a very important part of the operational content of the review of conventionality, which is to recognize that the Inter-American Court of Human Rights is the authentic interpreter of the ACHR.

In fact, in this case, constitutional judges clearly recognize the main content of the doctrine of control of conventionality and, being in close contact, correspond to the international obligations of the state. One of these obligations is the obligation to adapt the domestic legal system to international standards, the main sources of which are general principles of law, customary law and international convention law (case No. 2493-2013, document 12). In this particular case, the Constitutional Court will refer to the provisions of the decision of the Inter-American Court of Justice «Palamara Iribarn v. Chile».

The criteria established by the jurisprudence of the Inter-American Court of Human Rights can be considered, according to the jurisprudence of the Constitutional Court, as significant elements for judicial justification and as additional elements of analysis in constitutional jurisprudence. The difference between the two varies depending on whether the State was a party to an inter-American case whose case law is disputed.

Thus, on the one hand, according to the Constitutional Court of Chile, international standards for the protection of human rights developed by judicial practice, derived from cases to which the State of Chile is a party, are considered significant elements for judicial justification. In fact, in the Ayhin case – which relates to the Yorker case – constitutional judges referred to inter-American human rights norms and the jurisprudence of the Inter-American Court of Human Rights, especially those stemming from cases that took place after Chile, such as the case of Palamara Iribarn v. Chile. In this case, the aforementioned judges highlight the standards derived from this verdict as «essential» to resolve the request.

The cases of Eijin and Antilef of the Constitutional Court of Chile, as well as Jorker, serve to illustrate the evolution that the application of international human rights law by the constitutional judiciary has undergone in recent times, and from these examples it can be analyzed whether they are representative of a change in the legal paradigm in law, the emergence of a new public law and the practical development of dialogue between judges. Further study of Chilean constitutional jurisprudence outside of military jurisdiction is necessary to be able to continue building this argument.

Can these cases be considered an example of the leading role of a judge under the prism of a new legal paradigm? When the Constitutional Court – in the cases of Eikhin and Antilöf – applies international human rights instruments, and especially inter-American jurisprudence, it demonstrates a paradigm shift that takes the form of accommodating dialogue.

Can these cases be an example of the leading role of the judge in the context of the new public law? Eikhin and Antilef are, in our opinion, pragmatic examples of this new public law, the creation of which no longer takes into account the exclusive power of the state. In this sense, the national court plays a prominent role. Therefore, the leading role of the judge is one of the characteristic features of this paradigm shift and the new public law. Eikhin and Antilef made it clear. Constitutional judges establish a multi-level dialogue between judges that aims to adapt the Code of Military Justice and existing jurisprudence on the jurisdiction of military courts to the more favorable standards developed by the inter-American judge. To this end, the Constitutional Court uses generally accepted international instruments, but, above all, increasingly uses modern and suitable interpretive methods in the field of human rights, demonstrating a growing dialogue of a multi-level nature.

Is there a dialogue between judges in these cases? Nevertheless, Eikhin and Antilöf demonstrate the timid but promising concern of constitutional judges to establish a dialogue with inter-American judges. From the foregoing, it follows that not only the reference to the jurisprudence in relation to Chile, as in the case of Palamar Iribarne, but also the use of jurisprudence in relation to other states parties to the American Convention on Human Rights, for example, in the case of Radila Pacheco v. Mexico, indicates. In the Eikhin and Antilöf cases, the constitutional judges adapted the Code of Military Justice and, in addition, the interpretation that had come so far from jurisprudence, to the standards established by the American Convention on Human Rights and to the interpretation of the Inter-American Court of

Human Rights. For this reason, as already mentioned in this study, it can be argued that the Chilean Constitutional Court, in the case of Eijín y Antiléf, established a dialogue with inter-American judges on the modality of the corresponding interpretation. Both before the drafting of this article and after these decisions, the Supreme Court systematically adhered to the criterion established by the Constitutional Court, establishing a fruitful and accommodating dialogue in a horizontal manner. Finally, let's see whether in the future the Constitutional Court will insist on this desire to establish a multi-level dialogue between judges, which is aimed not at subordination, but at the predominance of the most favorable decision for the individual.

Conclusion. Judicial dialogue does not necessarily have to be about the same rights or issues, nor is it measured in quantitative terms, as the study carried out shows that the Constitutional Chamber uses the jurisprudence of the Court of San José more frequently due to the type of constitutional proceedings it is in charge of and the large number of sentences it issues per year. On the other hand, in the relationship between the two jurisdictions, interpretative conflicts have been present, such as in the Artavia Murillo case related to in vitro fertilisation, the important thing is that these differences were overcome and did not lead to a 'war between courts' as in the case of Venezuela, or a 'war between legal systems' in the case of Trinidad and Tobago, where these States denounced the Court's jurisdiction.

In the Inter-American System of Protection, it is necessary to create an instrument of institutional judicial dialogue such as a conventionality referral that allows, with a regulated normative procedure, the supreme jurisdictions and the Constitutional Courts or Tribunals of the region to resort to the Inter-American jurisdiction when, in the resolution of a specific case, they have reasonable doubts about the application, interpretation and validity of an instrument that forms the parameter of conventionality with domestic law. This would strengthen the jurisdictional protection of human rights and judicial dialogue in the region.

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