# Povse v. Austria: Taking Direct Effect Seriously?

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Perhaps one of the most difficult questions in International Law is the relationship between international conventions. States must comply with the obligations established in the treaties they are bound by. All the parties to the treaty are entitled to require the application of the treaty, which is compulsory for them. A problem arises when a State is bound by more than one treaty, and compliance with of one of them implies the violation of another one. Art. 30 of the Vienna Convention on the Law of the Treaties sets rules to avoid the problems linked to the coexistence of treaties, but these rules do not suffice to solve all the difficulties which may arise. Let's take the case of two conventions to which only a few States are simultaneously parties. According to the Vienna Convention, when the parties to the later treaty do not include all the parties to the earlier one, "as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations". In other words, if State "A" is bound by treaty "1" with State "B", and by treaty "2" with State "C", "A" must apply treaty "1" in its relations with State "B" and treaty "2" in its relations with State "C". However, sometimes this is simply not possible; both treaties apply simultaneously, and compliance with one of them implies the immediate breach of the other.

At first sight, this was the situation in *Povse*. The enforcement in Austria of the Venice Youth Court's return orders allegedly violated art. 8 of the ECHR; at the same time, it had to be granted according the EU Regulation 2201/2003. The conflict between the international obligations arising from EU law and from the European Convention seemed unavoidable; Austria had to decide between two international obligations. It was not possible to correctly apply both the European Convention and the European Union Regulation.

Of course, as the ECtHR decision in *Povse* shows, this is not completely true. The ECtHR has interpreted the Convention on Human Rights in a way that resolves the contradiction between the Convention and EU Law; according to the Court, a

Contracting State fulfils its obligations as a member of the Convention when it simply complies with its obligation as member of an international organisation to which it has transferred a part of its sovereignty, provided that the international organisation "protects fundamental rights (…) in a manner which can be considered at least equivalent (…) to that for which the Convention provides". However, I am still interested in showing how the contradiction between the Convention on Human Rights and EU law works, in order to fully understand the meaning of the case law of the ECtHR.

There are cases in which compliance with European Union law implies a breach of the European Convention. From a pure Public International Law perspective, the breaching State incurs in international responsibility. There is also an internal perspective. International treaties are part of the internal law of the State, and judges, authorities, and the public in general must observe, respect and apply them. How do they deal with the contradiction between different treaties? How do judges, authorities, etc., comply with EU law and with the ECHR in case of a conflict? This is not an easy question. If we only take into consideration the internal law of the States and international law, the answer is that each State decides in which way international law is implemented by its authorities and courts; national courts are bound by the domestic provisions on the internal effect of international law. However, the answer is not exactly the same when it comes to EU Law: at least, if we take the direct effect of EU Law seriously. As the ECJ has already held, EU law confers rights to individuals which the courts of Member States of the European Union must directly recognise and enforce. This means that the courts of the Member States are directly bound by EU law. State law is not needed for the direct application of EU law to be achieved. That is the reason why some academics have held that the courts of the Member States should be seen as Courts *of the European Union* when they apply EU law (see A. Barav, "La plenitude de competénce du juge national en sa qualité de juge communautaire", *L'Europe et le Droit. Mélanges en homage à Jean Boulouis*, Paris, Dalloz, 1991, pp. 93-103, pp. 97-98 and 103; D. Ruiz-Jarabo Colomer, *El juez nacional como juez comunitario*, Madrid, Civitas, 1993).

If Member State courts are to be considered not as national courts, but as EU courts, when they apply Union law, a breach of the ECHR arising out of the application of EU law by a national court should not be attributed to the State, but to the EU itself. It would not be coherent to admit the direct effect of EU Law

and, at the same time, to hold that Member States are liable for a breach of the ECHR arising out of the application of EU Law by their national courts.

Of course, the point of view I have just explained is far from being the common understanding of the relationship between EU Law and the ECHR. Nevertheless, maybe the way in which the European Court of Human Rights has dealt with the contradiction between EU law and the European Convention on Human Rights in *Povse* is nothing but a consequence of the impossibility to put the blame on the State for the "mistakes" of EU law. Perhaps when the EU becomes a member of the European Convention on Human Rights this will be more evident – maybe then we will realise that, in cases like *Povse*, the complaint ought to be addressed to the EU and not to the Member States.