

The Problems of Interpretation of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the European Court of Human Rights

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ABSTRACT

According to the clause 1 of Article 32 of the European Convention for the protection of Human Rights and Fundamental Freedoms of 1950 (herein after referred to as the European Convention or the Convention) the competence of the European Court of Human Rights (herein after referred to as the Court or the Court) extends to all issues of interpretation and application of the Convention and its protocols.

Thus, the European Convention makes the Court the only tool of the way of understanding of the rights and freedoms protected by it. Interpretation of the provisions of Convention lies in the basis of the Court activity as immovable clod that stands guard for protection of human rights, and that is a place where the State is directly responsible before a human.

Introduction

The problem of interpretation of the European convention for the protection of human rights and fundamental freedoms in the European court on human rights is studied and considered within the framework of the author's dissertation work, which aim is the research of the problem of execution of the solutions by the state and establishment of the uniqueness of practice of the European court on the human rights and research of the problem in relation to its usage at the national level.

The effectiveness of the protection of human rights in modern conditions is impossible without the corresponding jurisdictional control activity, as it is in the condition of existence of the mechanism of control and execution of the judicial resolution the observance of the international and legal obligations taken by the state and the regulatory provisions of its domestic state order is provided.

Ukraine entered to the European Council (November 9, 1995), having recognized the necessity to implement generally accepted European standards, which are set or recognized by the international organizations, international legal acts, national right acts of the democratically developed countries, where the human rights are the elements of such standards.

Among the factors, which condition implementation of such standards into the system of the rights protection of the citizens of Ukraine, the important role belongs to the European court for the protection of the human rights that acts according to the European Convention for the protection of human rights and fundamental freedoms of 1950, that was approved by Ukraine on September 11, 1997.

The important moment in such display of aspiration to the European integration is the issue of implementation and observance of the Convention guarantees by means of the European Court activity at the national level. This means that in regulation of the relation between state and citizen, between state and legal and physical entities, the qualitative changes connected directly with functioning of the European Court, which resolutions become the constituent of the Ukrainian legislation according to the Convention and Constitution of Ukraine take place. The result of this is acquisition of the important legal meaning of the practice by the European Court in the aspects of the problem of execution of its resolutions and changes, which are brought by the case-law practice of the Court in the domestic state legal order.

The basic tasks, which should be solved, are the following ones: the reveal of the legal nature of the Court, its task, competence, forms and methods of the activity; the research of the control mechanisms over the

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execution of the Court resolution and execution of these resolutions at the national level; the determination of the separate aspects of the influence of the Court resolutions on the legal system of the state; the formation of the suggestion in relation to the further improvement of the legislation of Ukraine and optimization of the activity of the state authorities in the aspect of the Court resolutions; the establishment of the issue in relation to the effectiveness of the national system in the conditions of activity and practice of the Court.

According to the clause 1 of Article 32 of the European Convention for the protection of Human Rights and Fundamental Freedoms of 1950 (hereinafter referred to as the European Convention or the Convention) the competence of the European Court of Human Rights (hereinafter referred to as the Court or the Court) extends to all issues of interpretation and application of the Convention and its protocols.

Thus, the European Convention makes the Court the only tool of the way of understanding of the rights and freedoms protected by it. Interpretation of the provisions of Convention lies in the basis of the Court activity as immovable clod that stands guard for protection of human rights, and that is a place where the State is directly responsible before a human.

Without the Court with its indissoluble connection with the European Convention there would not exist the European system of human rights protection. There would be no improvement of approaches in application of the Convention for more effective protection of human rights produced in the process of interpretation of the Convention and thus formation of a unique practice of the Court.

Nevertheless, in the Interlaken Declaration dated from February 19, 2010 which has launched the process of strengthening the European system of human rights protection, and approval of more strict international control over compliance of the European Court case law, the member states directly drew attention of the Court to the fact that it should improve the quality of Court resolutions pronounced. Furthermore, the most important thing is that it should avoid reconsidering of the questions of fact or national legislation, which have been considered and solved by the national authorities in accordance with its case law because the Court is not a court of forth instance (Interlaken Declaration, 2014).

The task that has been entrusted to the Court by member states of the Convention is protection of the rights and freedoms not as something theoretical and illusive, but as something that is enough concrete and tangible (Understanding, 2014).

Proceeding from that, the issue of interpretation of the European Convention by the Court and frameworks, which the Court may follow in the process of using provisions of the Convention, acquires more topicality that will become the aim of research in our article. Indeed, without the interpretation of the content of the rights and freedoms enshrined in the Convention, it would be impossible to use them.

Interpretation of the rules about human rights has no special mechanism different from the generally accepted instruments in the international law. Establishing of the regulative content of one or another right of a human was regulated by the articles 31-33 of the Vienna Convention on the Law of International Treaties of 1969 (hereinafter referred to as the Vienna Convention) (Viennese, 2014).

Thus, the clause 1 of Art. 31 of the Vienna Convention legitimizes the method of identifying the essence and content of the rule of law on the assumption of its subject and target orientation. The clause 1 of Art. 32 of the Vienna Convention consolidates an understanding of the preamble of the treaty as an integral part of the context, without which interpretation is unacceptable (Viennese, 2014). The Court further pointed out how important preamble is for determination of the subject and purposes of the rule of law, and norms of treaty subjected to interpretation (Case of Folgero and Others, 2007).

Altogether, the special nature of the international "rights advocacy" treaties, recognized both in a doctrine and practice of the international law, cannot be refracted through their interpretation: in particular, it requires giving a decisive importance to their object and purpose, with possible ignoring other tools and methods of interpretation at that.

Therefore, the Court first of all had to develop its own and inherent only to it principles and methods of interpretation.

The European Court of Human Rights has repeatedly emphasized that interpretation of the European Convention on Human Rights should be based on the general international legal principles of interpretation, but with the obligatory accounting of the special nature of the European Convention and the respective rules of the European Council (Huseynov, 1999).

Principles and methods of interpretation

At interpreting provisions of the Convention the European Court of Human Rights uses all generally accepted principles and methods of interpretation of the international treaties. However, the greatest meaning to its interpretive activities have special, innovatory principles and methods of interpretation, that is confirmed in the Court resolutions aimed at implementing of the human rights and freedoms.

We know the traditional methods of interpretation: grammatical, specially-legal, logical, systematic, historical and customary (common usage), as well as a literal, expanding and dynamic interpretation (Regulation, 2014).

But we shall stop our attention on special and innovative principles and methods of interpretation used by the Court in interpreting the provisions of European Convention.

In other words, the specific nature of the European Convention "imparts" the target orientation to the process of its interpretation; achievement of the effective protection of human rights namely becomes the main measurement for "weighing" of the most adequate implementation of these rights by the state. Thus, the principle of effectiveness lies in the basis of interpretation of the international treaties in the area of human rights (Mik, 1993). This principle involves the so-called dynamic interpretation (Matscher, 1993).

The principle of effectiveness allows adaptation of the purpose of protection for human rights of an individual in the best way to the changing social conditions or society development. The peculiarity is in that the Court takes into account the factual and legal conditions not only in the state of the dispute consideration, but also in other member states to the Convention, as the question is about all European concepts. It promotes certain independence of the Court at detecting of the European standards and settling the specific cases. The Court does rely on the original intentions, which the states used as guidance during development of the Convention and on those tasks that, according to the Court, should be solved in the modern world during human rights protection (Yourow, 1996; Spielmann, 1999; Barents, 2004).

The Court based all its activities, having pushed off the basic suggestion according to which the parties, while signing the Convention, sought ensuring the effective use of the rights and freedoms guaranteed by the Convention for all persons that are under their jurisdiction (Huseynov, 1999).

The absence of preciseness and distinctness in the theoretical approaches and judicial practice of the state prevents to implementation of the effectively acting system of guarantees of the European Convention for the protection of human rights, which by means of the European Court can become the last point in rights protection that had not been provided at the national level.

The effectiveness of the protection of human rights in modern conditions is impossible without respective jurisdictional regulating activity, as compliance of the international and legal obligations and regulatory provisions of its domestic order taken by the state is provided namely in the conditions of existence of the mechanisms of control and execution of the judicial resolutions.

The Article 15 ensures execution of the rights and freedoms, stated in the Convention, without any discrimination, and the Article 13 provides the right for effective means of the legal protection in the respective national body in case of violation of the rights and freedoms, stated in the Convention. Every person, who is under jurisdiction of the member-states to the Convention, is a subject of rights and freedoms, which are specified by the Convention (European, 2014).

The Court has brought out the new provisions from those already contained in the Convention, without which, in its opinion, the usage of the rights and freedoms regulated by the Convention will lose its meaning. This approach plays a major role in establishing the latest standards of human rights by the Court, and

judicial decisions serve as a source of substantial content of the rights corresponding to the current challenges and realities (Kotsyuba, 2012).

It is hardly possible to establish, which the real intentions of the contracting states were, but certainly all this is one more reason for not subjecting them to the obligations, which do not result clearly from the Convention, or at least in a manner free from reasonable doubts.

There is an internal problem at the level of the European Court of human rights – increase of loading (the quantity of complaints) that are handled to the European Court of human rights. Year by year the loading on this court body is increased that in time will lead to impossibility of execution of the functions entrusted to it. As a result of order, existing in the judicial systems of the range of countries, extremely long-term consideration of claims up to several years relating to the very serious violations of the human rights is probable. If the existing system is not reformed, there will be avalanche-like increase of the quantity of cases, which timely settlement becomes impossible. Nowadays the regulated changes in the activity of European Union for the protection of human rights are included into the rule 42 of the Regulations. The queue of case consideration was implemented. There were determined the claims, which appropriateness is undoubted, and obviously unaccepted claims. Such classification gives possibility to set the range of cases without consideration that will save the resource of European Union for the protection of human rights for settlement of the most important cases. According to the general rule, the case belonging to the highest category will be considered earlier than the case belonging to the lower category.

The aim of the new rules is provision of quicker consideration of the important and leading cases that deal with the system problems, which are able to raise the great quantity of new claims. The second cases, i.e. cases connected with the system problems already detected by the Court within the framework of pilot resolutions receive the low priority. The lowest priority cases are the cases related to appeals, which evidently do not correspond to the acceptance criteria.

As opposed to the legal systems with classical law-case, the European system for protection of human rights is constantly adapted to the new social relations. As it was repeatedly specified in the resolution of the European Union, the Convention is a living mechanism that is constantly developing. Thus, the judicial practice has the element of dynamics – it changes in the course of time in order that the judicial practice could be used for the sake of provision of Convention interpretation of changes in the society and situation existing today.

Among the examples from the practice of European Court it is possible to name the case of Burdov vs the Russian Federation. The Convention doesn't contain any prescription about benefits to Chernobyl cleanup veterans; however, the corresponding benefits are provided by the national legislation. In such case guarantees must exist for provision of the rights, i.e. if the national legislation of a certain state provides any human right, then there guarantees must exist to its execution.

The most complex measure is making amendments into the legislation or, even, conduction of the global legal reforms, as it requires considerable resources and time.

On the other part, the most cost-effective one of the measures is informing the judges about resolution of the European court. As a result, the courts prevent further analogous violation at the stage of usage of the national means of legal protection of human rights.

Moreover, they can respectively correct their work. Thus, non-compliance of the reasonable term of judicial proceeding is a violation of the article 6 § 1 of the Convention. At recognition of the state as being responsible for violation of such character the resolution of European court is sent to all internal courts for notice (Matscher, 1993).

The Court pointed out that securing legal proceedings fairly and expeditiously conducted would lose its meaning, if there would not be proceeding itself, and concluded from that it established the right of access to justice (Case of Folgero, 2007).

There could be mentioned the possibility of protection for that rights, which have not been reflected in the European Convention. For example, among those rights there are protection for environmental rights (Case of Golder, 2014) and rights in taxation issues (Case of Guerra, 2014).

Having analysed the practice of the Court, we can separate the possibility of the protection of those rights, which didn't receive reflection in the European Convention. As an example among such exercises we'll dwell on the possibilities for protection of the ecological and stock rights, as well as the rights on the issues of taxation.

Ecological rights. The wish of the European Court to set connection between protection of the natural environment and human rights in their resolutions reflects increasing recognition of the possible ecological problems and protection of human rights in this context.

Protection of rights on the issues of taxation. There exists possibility of appeals to the Tax Litigation Court, which are not mentioned both in the Convention, and in the protocols to it. Although the Court practice in relation of the claims on taxation issues is not essential, but it already became sufficient in order to speak about certain standards of consideration of these claims, which were developed by the Court and already became law-cases.

Protection of the stock rights. The European Court according to the general rule doesn't accept claims for consideration, submitted in connection to the violation of rights of the legal entity, neither from minority shareholder (parties), nor from shareholders (parties), which own the majority or control stock (shares)(European, 2014; Viennese, 2014; Marmazov,2014; Matscher, 1993; Case of Golder, 2014; Spielmann, 1999).

The concept of the European Convention as a living and evolving organism thus has become a personified dynamic characteristic of the efficiency of requirements that was reflected in the Court resolution of *Tyrer v. The United Kingdom* dated from April 25, 1978. Namely, it was pointed out that interpretation of the human rights should be performed in the light of present-day conditions (*Case of OAO*, 2012).

Dynamic interpretation of the rights and freedoms is necessary not only for ensuring that they were theoretical or illusory, but also practical and effective in order not to prevent their development (*Case of Tyrer*, 2014).

Restrictions of interpretation

Using dynamic interpretation with making innovations in interpretation proposed by the Court of the European Convention standard, the Court must be careful and cautious, and, if necessary, it should include some restrictions.

Adherence to the principle of "stare decisis" by the Court has the purpose of limitation of the "dynamism" of dynamic interpretation of the Convention and serves a unique mechanism of restrictions and counterbalances in the practice of the European Court: "stare decisis" limits the dynamic interpretation, and the latter does not allow it to stand firmly on the positions of its case-law provisions that over time may become out-of-date and no longer correspond to the objectives of the Convention(European, 2014).

In practice the Court does not adhere to a precedent as such, but puts the legal issues and answers them while interpreting the Convention. The results of this activity are indisputable, as they exist objectively and move to a higher level: they become legal positions to which the Court refers in the following decisions, calling them "precedents" (Yourow, 1996).

One of them is a rejection of spreading a new interpretation on a situation that occurred in the past, i.e. recognition that, in fact, it cannot have a retroactive effect. As it follows from the Court resolution of *Johnston and others v. Ireland* dated from December 18, 1986, interpretation of the rights and freedoms of the Convention and its Protocols must be interpreted in the light of present-day conditions. However, the Court cannot, by means of a dynamic interpretation, take a right that was not included therein at the outset from these instruments (*Case of Artico*, 2014).

Another example of restricting the dynamic interpretation is *Perez v. France*. It is about the inability of the applicant, who was convicted in Andorra, to refer to the French jurisdictional authorities to review the lawfulness of his detention in France. The Court stated that the control required by clause 4 of Art. 5 of the Convention, which the applicant referred to, is a judicial decision of Andorra.

This decision was criticized both by judges, remained in minority, and scientists. Emphasis was on the fact that the resolution does not comply with the Convention as a key element of the European justice. Finally, the Court could always consider the conduct of the respondent state in terms of Art. 1 of the Convention (Marmazov, 2014).

Conclusion

On the examples of the Court's resolutions the crucial role of principles and methods of interpretation used by the Court in determining the rights protected by the Convention, as well as the restriction of states' authority to intervene in these rights was demonstrated.

The dynamic approach to interpretation of provisions of the Convention is extremely important, because it is the only approach, which allows us regulating the human rights in the context of their historical evolution. Only such approach allows the European Convention to be relevant today, and allows the Court fully justify its purpose of existence as a guarantor and "living instrument" of the Convention.

Nevertheless it is necessary to take into account the fact that risk of using a dynamic interpretation by the international court could lead to establishing of a new legal regulation, different from the original text of the treaty, which is subjected to interpretation. And this is an unjustified risk that endangers the original intention of member states and their sovereign right for mutual legal regulation of certain relations that, as a result of all mentioned above, requires certain restrictions in interpretation.

According to aforesaid the recognized restrictions just only put the Court into the certain limits agreed by the member states to the European Convention, a clear example of which is the Interlaken Declaration dated from February 19, 2010. But it does not reflect the fact of vital necessity of using dynamic interpretation by the Court in order to secure the effective protection of human rights.

At this time in many countries of the world there exist mechanisms, which is imposed with the function of control over the strict observance of the Court resolutions. The examples include the legal system of Finland, Sweden, FRG and others. In Ukraine, the unique law "On execution of the resolution and application of the practice of the European Court on the human rights" was accepted that requires the corresponding analysis.

Among the actual theoretical and practical problem the important meaning belongs to the determination of the place and role of the judiciary system through the practice of the European Court activity, as well as the control over execution of the resolutions of the European Court in the state and legal mechanism.

The absence of the distinctness and definiteness in the theoretical approaches and court practice of the state prevents implementation of the effectively acting system of guarantees of the European Convention for the protection of human rights, which through the European Court can become the last point in the rights protection, which would not be provided at the national level.

The human rights belong to these standards of the democratic society, which are recognized by the world community. Having established the specified institute, at that Ukraine used the European model of protection of human rights within which the abstract and concrete controls are united and the availability of the domestic state mechanisms of the execution of the Court resolutions is provided.

The peculiarities of such domestic state mechanisms on the execution of the Court resolutions, which were formed in the state with traditionally strict democratic values and institutes, represent the big interest for us. However, undoubtedly, the problems of their existence and usage must be highlighted and solved.

In the further scientific searches the author plans properly consider the procedures, connected with the control at the international level of the state of execution of the Court resolutions by the state and issues, which are related to the problems of execution of these solutions at the national level with taking into account of the situation of Ukraine.

References

- Alisievich, E.S. (2011). Reform of the European Court of Human Rights : new solutions to old problems. *Bulletin of Volgograd State University*, 5-14, 118-124.
- Averianov, K.Y. (2012). On the question of the validity of the decisions of the European Court of Human Rights. *Actual problems of Russian law*, 4 (25), 36-45.
- Barents, R. (2004). *The Autonomy of Community Law*. London, Boston: Kluwer Law International.
- Bezbakh, V.V., Belikova, K.M. (2012). Decisions of the European Court of Justice - a mechanism to maintain and strengthen the enforcement of the EU. *Lawyer*, 11, 57-68.
- Borisova, L.A. (2012). Specificity of translation of judgments of the European Court of Human Rights. *Language, communication and social environment*, 10, 181-190.
- Boulouis, J. (1993). *Droit institutionnel des Communauté Europeennes*. Paris: Montchrestien.
- Case of Artico v. Italy. Judgement of the European Court of human rights of 13 May 1980. (2014). Retrieved from <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57424>
- Case of Folgero and Others v. Norway. Judgement of the European Court of human rights of 29 June 2007. (2007). Retrieved from <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81356>
- Case of Golder v. the United Kingdom. Judgement of the European Court of human rights of 21 February 1975. (2014). Retrieved from <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57496>
- Case of Guerra and others v. Italy. Judgement of the European Court of human rights of 19 February 1998. (2014). Retrieved from <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58135>
- Case of Johnston and others v. Ireland. Judgement of the European Court of human rights of 18 December 1986. (2014). Retrieved from <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57508>
- Case of OAO Neftyanaya Kompaniya YUKOS v. Russia. Judgement of the European Court of human rights of 8 March 2012. (2012). Retrieved from <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-106308>
- Case of Tyrer v. The United Kingdom. Judgement of the European Court of human rights of 25 April 1978. (2014). Retrieved from <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57587>
- European Convention on Protection for Human Rights and Fundamental Freedoms of 1950. (2014). Retrieved from <http://conventions.coe.int/treaty/rus/treaties/html/005.htm>
- Explanations Relating to the Charter of Fundamental Rights. (2007). *Official Journal*, 303, 17-35.
- Fernandez Esteban, M. L. (1999). *The Rule of Law in the European Constitution*. London, Boston: Kluwer Law International.
- Gaja, G. (1999). *New Instruments and Institutions for Enhancing the Protection of Human Rights in Europe?* Oxford: Oxford University Press.
- Halaidina, O.S. (2012). Precedent decisions of the European Court of Human Rights in the Russian legal system. *Actual problems of the humanities and natural sciences*, 4, 182-186.
- Huseynov, L. (1999). Features of interpretation of the international agreements on human rights treaties. *Belarusian Journal of International Law and International Relations*, 2, 1-12.

- Interlaken Declaration in 2010.(2014). Retrieved from http://www.chernobyl86.ru/spisok/zakon/osn_zakon/strasburg/interlaken_dec_rus.htm
- Joined cases 60-61/84 «Cinéthèque SA and others v Fédération nationale des cinémas française».(1985). *European Court Reports*, 5, 2605.
- Judgment of «Akdivar v. Turkey». (1996). *European Human Rights Reports*, 15, 182.
- Judgment of «Cantoni v France». (1996). *European Human Rights Reports*, 5, 1614.
- Judgment of «SW v United Kingdom». (1995). *European Human Rights Reports*, 21, 363.
- Koshcheeva, E.S. (2012). Importance of the decisions of the European Court of Human Rights in the interpretation of the right to trial.*Herald Vyatka State Humanities University*, 1, 69-75.
- Kotsyuba, R. A. (2012). Protection of human rights to nuclear safety in the practice of the European Court of Human Rights.*Scientific Proceedings of the Institute Legislation Rada of Ukraine*, 6(15), 32.
- Lawson, R. (1994). Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg. Leiden: Springer.
- Lutsenko, S.Y. (2013). Philosophy of law through the prism of the European Court of Human Rights.*Modern law*, 10, 46-49.
- Marmazov, V. (2014). Principle stare decisis and dynamism of the European Court of Human Rights. Retrieved from <http://femidacenter.info/sudebnaya-praktika/princip-stare-decisis-i-dinamichnost-praktiki-evropejskogo-suda-po-pravam-cheloveka2.html>
- Matscher, F. (1993). Methods of Interpretation of the Convention. The European System for the Protection of Human Rights. Boston, London.
- Mik, C. (1993). On the Specific Character of State Obligations in the Field of Human Rights.*Polish Yearbook of International Law*, 20, 126 –127.
- Nuriev, H.K. (2013). Judicial decisions nature of European Constitutional Courts. *Power*, 1, 113-116.
- Regulation of the interpretative function of the European Court of Human Rights.(2014). Retrieved from <http://www.law.edu.ru/script/cntSource.asp?cntID=100082175>
- Rubin, E.L. (2003). Rethinking Human Rights.*International Legal Theory: Human Rights*, 9, 78.
- Spielmann, D. (1999). Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies, and Complementarities. Oxford: Oxford University Press.
- Understanding the decisions of the European Court of Human Rights as a precedent interpretation.(2014). Retrieved from <http://datcanin.livejournal.com/64606.html>
- Viennese convention on Law of Treaties of 1969.(2014). Retrieved from http://www.un.org/ru/documents/decl_conv/conventions/law_treaties.shtml
- Yourow, H.C. (1996). The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence. Boston, London.