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The Application of the European Convention on Human Rights and Judicial Dialogue**

The article is dedicated to the issues of judicial dialogue between the European Court of Human Rights and domestic courts and of its peculiarities.

Key words: *Judicial dialogue between ECHR and domestic courts. The fourth instance doctrine, the absence of Doctrine of precedent, the Convention as a "Living Instrument", the comparative interpretation. Autonomous concepts.*

1. Introduction

Formal recognition of the European Convention on Human Rights (hereinafter referred to as the Convention) as part of the domestic law of the States parties to the Convention does not present particular difficulties. Although the ways of incorporating the Convention into the national legal system are different, all the States determine its status and place within their legal system.[1] Some States, such as Austria, confer to the Convention the status of Constitutional law. This means that in order to protect the rights and freedoms provided for in the Convention, individuals can apply to the Austrian Constitutional Court. In Germany, Italy, Denmark, Norway, Sweden and Finland, the Convention takes the rank of ordinary law.

In other countries, the Convention is recognized after the Constitution as a law that has prior legal force in the hierarchy of ordinary laws, as in France, Greece, Spain, Portugal and Eastern European states.[2]

Nevertheless, the effectiveness of the application of the Convention with regard to individuals largely depends on the judiciary and functioning of domestic courts. Along with the fact that by adopting laws (for example, abolishing the death penalty on the basis of Protocol No. 6) or by implementing various reforms (improving the conditions of detention in penitentiary institutions), the State implements standards and requirements of the Convention, it is extremely important that domestic judges understand and apply the Convention when dealing with concrete cases. The process of applying the Convention involves both judges of the European Court of Human Rights in Strasbourg (hereinafter the Strasbourg Court or the Court) and judges of various judicial instances in the States parties. At the same time, the manner in which these judges apply the Convention varies greatly.

The concept of the Convention is not reduced to the text of this international legal document and its Protocols. It implies first of all the rich case-law of the Strasbourg Court (hereinafter – the case-law), in which the Court interprets specific rights and freedoms enshrined in the Convention. By adopting spe-

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** Note: The foregoing article is dedicated to the 60th Anniversary of Prof. *Nona Todua*.

[1] *Grabenwarter Ch., Pabel K.,* Europäische Menschenrechtskonvention, 6. Aufl., München, 2016, § 3 Rn. 2.

[2] Ibid, Rn. 2-5.

cific court decisions, the Court establishes standards significance of which go beyond the particular case.[3] Therefore, the application of the Convention by domestic courts, the determination of the scope of specific rights and correct understanding of the main provisions of the Convention are impossible without the case-law and standards established by it.[4]

Although judges of both the Strasbourg Court and domestic courts are charged to apply the Convention, the principles and methods of their work, as well as their jurisdiction, are characterised by certain specificities.

For the judges of the Strasbourg Court, the Convention is the main source of law, since the Court decides whether applications lodged before it meet the requirements of the Convention and its case-law. For judges of domestic courts, the Convention serves an additional source of law when examining criminal, civil, administrative and other types of cases. The Strasbourg Court further relies on the legislation and case-law of the States parties.

The main purpose of the Strasbourg Court is to establish a breach of or compliance with the standards of the Convention by the State party. A judge of a domestic court checks the compliance of the actions by state bodies with the requirements of the Convention. The different legal status of the Convention within the domestic legal system predetermines the differences and peculiarities of the jurisdiction of domestic courts.

Although domestic courts are obliged to apply the Convention and it case-law, in some instances the application of the case-law without amending the national law is rather difficult. This happens when legislation imperatively establishes restrictions that are contrary to the Convention, for example, if the law establishes an unreasonably short limitation periods, which the Strasbourg Court found to be in violation of Article 6 of the Convention.

In the process of practical application of the Convention by domestic courts, an important issue of access to the case-law often arises. Judges in the States parties use the state's official language at work, and they are not required to be fluent in the official languages of the Strasbourg proceedings. To solve the problem of providing courts with relevant case-law in understandable languages remains one of the central issues of the implementation of the Convention.

The effectiveness of the Convention in the States parties depends not only on the execution of specific Court judgments in relation to a particular state. It largely depends on the recognition and acceptance of the case-law by the domestic courts. To a certain extent, there is a dialogue between the judges of the Strasbourg Court and the domestic courts of the States parties. This is primarily reflected in the fact that judges in Strasbourg carefully consider opinions and arguments of domestic courts. In assessing the actual circumstances of the case, the Strasbourg Court relies on the facts established by domestic courts.

In practice, there are also cases when judges of domestic courts do not agree with the interpretation adopted in Strasbourg.[5]

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[3] *Ireland v. The United Kingdom* [1978] ECHR (Ser. A.), № 25, 154.

[4] Recommendation of the Committee of Ministers of the Council of Europe of December 18, 2002 Rec., 2002, 13, <www.coe.int> [17.12.2019].

[5] *Harris D., O'Boyle M., Warbrick C.,* Law of the European Convention on Human Rights, 3rd ed., GB, 2016, 36.

The work of the judges of the Strasbourg Court is based on certain principles, some of which deserve particular attention, such as **the fourth instance doctrine, the absence of Doctrine of precedent, the Convention as a "Living Instrument", the comparative interpretation or autonomous concepts.** The specificities of these principles make obvious the difference between the working methods of the judges of the Strasbourg Court and those of judges in the domestic court.

2. The Fourth Instance Doctrine

Despite the fact that the Strasbourg court can only take a case into consideration after all domestic remedies have been exhausted, it does not constitute an additional court of appeal, a fourth instance in relation to domestic courts applying the laws of the participating States. Its functions do not include the elimination of errors of fact or law allegedly committed by a domestic court, unless they constitute a violation of the rights and freedoms protected by the Convention:[6]

> The Court reiterates that, according to Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention.

As a rule, the Strasbourg court agrees with the interpretation of the law by the domestic courts, but it may not agree with the interpretation of the law by the courts when this interpretation is "arbitrary or manifestly unfounded:"

> It reiterates that, according to its long-standing and established case-law, it is not for this Court to deal with alleged errors of law or fact committed by the national courts unless and in so far as they may have infringed rights and freedoms protected by the Convention (see, for instance, *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999‑I, and *Perez v. France* [GC], no. 47287/99, § 82, ECHR 2004‑I), for instance where it can, exceptionally, be said that they are constitutive of "unfairness" incompatible with Article 6 of the Convention. While this provision guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way in which evidence should be assessed, these being primarily matters for regulation by national law and the national courts. Normally, issues such as the weight attached by the national courts to given items of evidence or to findings or assessments in issue before them for consideration are not for the Court to review. The Court should not act as a court of fourth instance and will not therefore question under Article 6 § 1 the judgment of the national courts, unless their findings can be re-

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[6] *Garcia Ruiz v. Spain*, [1999-I], 31 EHRR 589, §28.

garded as arbitrary or manifestly unreasonable (see, for instance, *Dulaurans v. France*, no. 34553/97, §§ 33-34 and 38, 21 March 2000; *Khamidov v. Russia*, no. 72118/01, § 170, 15 November 2007; and *Anđelković v. Serbia*, no. 1401/08, § 24, 9 April 2013).[7]

In *Khamidov v. Russia*[8] the Court gave to the domestic court's decision the following assessment:

> "In the Court's view, the unreasonableness of this conclusion is so striking and palpable on the face of it that the decisions of the domestic courts in the 2002 proceedings can be regarded as grossly arbitrary, and by reaching that conclusion in the circumstances of the case the domestic courts in fact set an extreme and unattainable standard of proof for the applicant so that his claim could not, in any event, have had even the slightest prospect of success".

3. The Absence of Doctrine of Precedent

Another feature of the work of the Strasbourg court is the absence of Doctrine of precedent. The Strasbourg court "is not bound by its previous decisions", but "it is usually guided by its own precedents and applies them, and this course is carried out in the interests of legal certainty and orderly development of the case law of the Convention:"

> "The Court is not bound by its previous judgments... However, it usually follows and applies its own precedents, such a course being in the interests of legal certainty and the orderly development of the Convention case-law. Nevertheless, this would not prevent the Court from departing from an earlier decision if it was persuaded that there were cogent reasons for doing so. Such a departure might, for example, be warranted in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions."[9]

The Grand Chamber of the Strasbourg Court in one case stated that "in the interests of legal certainty, predictability and equality before the law, it should not depart without good reason from the precedents formulated in previous cases:"

> "While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases."[10]

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7 *Bochan v. Ukraine* [05.02.2015], ECHR, No. 2, no. 22251/08, § 61.
8 *Khamidov v. Russia* [15.11.2007], ECHR, no. 72118/01, § 174.
9 *Cossey v. UK* [1990] A 184, 13 EHRR 622, § 35, PC.
10 *Goodwin Christine v. UK* [2002-VI], 35 EHRR 447, § 74, GC.

4. The Convention as a "Living Instrument"

One of the features of the work of the Court is the interpretation of the Convention "in the light of modern realities". The decisive factors for the Court are the standards currently adopted in Europe, and not the standards that existed when the Convention was adopted. It prefers a more dynamic approach to the assessment of facts than a historical one.[11]

A clear example of the "vitality" of the Convention is the establishment by the Strasbourg Court throughout the text of the Convention, especially with respect to Art. 3 and 8, positive obligations of the state.[12] On the other hand, the Court takes into account the changes taking place in the legal systems of the participating States and tries to provide for these changes in its decisions.

In *Goodwin Christine v. UK*, despite the sex reassignment surgery, the applicant, from the point of view of the law, remained a man, which accordingly affected her life in those areas where the issue of her gender was of legal importance, primarily on the right of a man and woman to join marriage. Although the first sentence of Article 12 of the Convention specifically indicated the right of a man and woman to marry, the Court was not convinced by the respondent Government that it could still be assumed that these terms were associated with sex only by biological criteria. Since the adoption of the Convention, significant social changes have occurred in the institution of marriage. Significant changes have also taken place in the development of medicine and science in the field of transsexuality. The Court concludes that, in accordance with Article 8 of the Convention, the criterion of the relevant biological factors cannot further be decisive in the event of a denial of legal recognition of a sex change.

5. The Comparative Interpretation

In interpreting the Convention and introducing new standards, the Strasbourg court often applies a comparative legal analysis of the laws and jurisprudence of participating States.[13] As a rule, this comparative legal material becomes part of a judgment.[14]

6. Autonomous Concepts

Although the Strasbourg Court applies the law and jurisprudence of the participating States, the opinions of the domestic courts and the Strasbourg court may differ on certain concepts. In other words, the Court independently determines the content of these concepts, regardless of how much this content corresponds to that adopted in domestic law. Such concepts include "civil rights" or "criminal charges", according to Art. 6 of the Convention, or the concept of "associations" according to Art. 11 of the Con-

[11] *Leach Ph.,* Taking a Case to the European Court of Human Rights, 4th ed., Oxford, 2017, 190.
[12] *Harris D., Boyle M. O., Warbrick C.*, Law of the European Convention on Human Rights, 3rd ed., GB, 2016, 11.
[13] *Jacobs F. G., White R., Ovey C.*, The European Convention on Human Rights, 6th ed., Oxford, 2014, 78.
[14] Advisory Opinion P16-2018-001, ECHR 132 (2019), delivered on April 10, 2019, §§ 22-24.

vention, as well as the concept of "ownership" in accordance with Art. 1 of Protocol No. 1. These concepts are called autonomous concepts.[15]

In the case of *Micallef v. Malta*[16], the Grand Chamber, referring to the judicial law of the Court, reiterated that the Court independently determines the content of these concepts regardless of the content in domestic law:

> "According to the Court's case-law, the concept of "civil rights and obligations" cannot be interpreted solely by reference to the domestic law of the respondent State. The Court has on several occasions affirmed the principle that this concept is "autonomous", within the meaning of Article 6 § 1 of the Convention (see, among other authorities, *König v. Germany*, judgment of 28 June 1978, Series A no. 27, pp. 29-30, §§ 88-89, and *Baraona v. Portugal*, judgment of 8 July 1987, Series A no. 122, pp. 17-18, § 42). The Court confirms this case-law in the instant case. It considers that any other solution is liable to lead to results that are incompatible with the object and purpose of the Convention (see, mutatis mutandis, *König*, cited above, pp. 29-30, § 88, and *Maaouia v. France* [GC], no. 39652/98, § 34, ECHR 2000-X)".[17]

7. Protocol No. 16 and New Forms of Judicial Dialogue

With the entry into force on 1 August 2018 of Protocol No. 16 in relation to 10 States parties (Albania, Armenia, Estonia, Finland, France, Georgia, Lithuania, San Marino, Slovenia and Ukraine) there appeared a new form and the possibility of a dialogue between the Strasbourg Court and domestic courts. The Supreme and Constitutional Courts are given the opportunity to request an advisory opinion from the Strasbourg Court on the points of interpretation and application of the rights and freedoms enshrined in the Convention and its Protocols. The advisory opinion, which is adopted by the Grand Chamber of the Court, contains the reasons and arguments of the Court, but it is not binding on domestic courts.

The prerequisite for applying to the Strasbourg Court for an advisory opinion is that a request must originate in pending domestic proceedings currently being heard by a highest court or tribunal or Constitutional Court. The first advisory opinion was adopted on 10 April 2019 at the request of the French Court of Cassation *(Cour de cassation)*, and it concerns the issue of recognition a birth certificate issued abroad to a child born abroad as a result of a gestational surrogacy arrangement.

This opinion is noteworthy in that the Grand Chamber for the first time defined the boundaries of advisory opinion requests. It confirmed that the Court has no jurisdiction either to assess the facts of a case or to evaluate the merits of the parties' views on the interpretation of domestic law in light of Convention law, or to rule on the outcome of the domestic proceedings. Its role is strictly limited to furnishing an opinion regarding the questions submitted with the requirements of the Convention and its case-law.

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[15] *Leach Ph.,* Taking a Case to the European Court of Human Rights, 4th ed., Oxford, 2017, 191.

[16] *Micallef v. Malta* [15.10.2009], ECHR, no. 17056/06, § 84.

[17] *Ferrazzini v. Italy* [GC], no. 44759/98, §§ 24-31, ECHR 2001-VII.

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