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Svitlana KARVATSKA

Lubov ZAMORSKA

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HUMAN RIGHTS PRINCIPLES INTERPRETATION IN THE CONTEXT OF THE ECHR

Svitlana KARVATSKA ¹, Lubov ZAMORSKA ²

Abstract

European system of human rights protection, with the European Convention of human rights and fundamental freedoms protection from 1950 as its basis, is the most effective among existing regional systems of human rights protection. Effective protection of individual civil and political rights according to the UCHR (European convention of human rights) in the countries of Central-Eastern, South-Eastern Europe and the former USSR is impossible without clear comprehension of the Convention interpretation principles, which will allow to take into consideration new social-economic and political conditions. The instances of the interpretation principles use in the ECHR cases, versus Ukraine in particular, give chance to display potential possibilities to widen the Convention of human rights protection application spheres and to perfect national legislation and legal-realization practice.

The investigation and study of the principles for the interpretation of the Convention about the Protection of Human Rights and Fundamental Freedoms are important in terms of improving the efficiency and effectiveness of the interpretation activities both the European Court of Human Rights and national authorities applying the Convention, where predominantly techno-dogmatic methods of interpretation are spread and there are no sufficient skills to use precedents in law enforcement practice, judicial, in

¹ PhD in Law, Doctoral Candidate of the Department of International Law at Institute of International Relations Taras Shevchenko National University of Kyiv, Associate Professor of the Department of Philosophy and Theory of Law at Yuriy Fedkovych Chernivtsi National University, Ukraine. svitlana.karvatska288822@gmail.com

² Doctor of Law, Associate Professor of the Department of Philosophy and Theory of Law at Yuriy Fedkovych Chernivtsi National University, Ukraine., Chernivtsi, Ukraine; e-mail: Zluba83@gmail.com.

particular. Comprehension and clarifying the principles of interpretation of the Convention provisions and their practical application to the decisions of the ECtHR allow not only to solve the problems of legal proceedings, but rather the problems of social regulation. political, economic. Interpretative principles are an important basis for ensuring the proper implementation of the right to a fair trial at the national level.

Keywords:

ECHR, ECtHR, Convention law, interpretation of law, interpretative principles, judicial activism, court practice, national legislation.

1. Introduction

Contemporary international law doesn't regard the problem of human rights and fundamental freedoms protection as the task of innerstate direction, but as the question, concerning all the international community, that's why it can be solved on condition of international cooperation. European system of human rights protection, with the European Convention of human rights and fundamental freedoms protection from 1950 as its basis, is the most effective among existing regional systems of human rights protection. Correct use of somewhat abstract evaluative standards of human rights and fundamental freedoms protection Convention by the states-members' courts is possible only in correlation with proper study of the cases both taken into consideration, and those not being considered by the European Court on human rights and its practice in general. Effective protection of individual civil and political rights according to the UCHR (european convention of human rights) in the countries of Central-Eastern, South-Eastern Europe and the former USSR is impossible without clear comprehension of the Convention interpretation principles, which will allow to take into consideration new social-economic and political conditions, to widen the sphere of its application, to improve national legislation, to eliminate discrepancies in court practice and, as a result – to reduce the quantity of appeals to the ECtHR (european court of human rights).

2. Theoretical Background

A lot of investigations are dedicated to the analysis of interpretation of law nature, determination of its role in the functioning of the law itself,

description of the participants of interpretational activity circle, concrete definition of the subject and object of interpretation etc. [1: 699]. Interpretation of the European Convention is characterized with special complications, it's right, that only the ECtHR determines the only acceptable variant of the Convention content comprehension and protocols to it in general, their norms and legal notions. "Legal conceptions and standards deserve special attention, they are formed owing to the ECtHR jurisprudence and determine state's "legal frameworks" and law-applying practice demands" [2].

Let's note, that the term "interpretation principles" isn't defined adequately. The term "commentation", not "interpretation", is used more often in post-soviet countries, and that fact constricts greatly the subject of investigation. Some differences, concerning the approaches to interpretation principles, can be seen among European and American scientists. As for American lawyers, the most detailed explanation of interpretation principles and canons were given by the judges of the Supreme Court of the USA. A. Scalia and B. Garner [3], who selected and substantiated such groups of interpretation principles: fundamental canons, semantic canons, syntactic canons, canons of managerial structuring. But, the quantity of canons doesn't mean, that they surely contradict each other or are of no practical necessity. Besides, a lot of these canons are seldom used nowadays, especially in conditions of Romanic-Germanic legal system [4]. Instead, the Convention interpretation principles consider different levels of legal systems [5: 17-8], and European scientists determine the content, index, groups, interpretation principles use, abilities and prospects of the ECtHR interpretational activity perfection as an optimization means of the Council of Europe and EU legal basis.

H. C. K. Senden analyses four instruments of interpretation (theological, comparative, evolutionary, autonomous) by supranational courts: the EU Court and the ECtHR as to the cases about fundamental rights "in multilevel legal context", which creates a special character of difficulties. The author stresses, that their efficacy depends greatly on the cooperation of national bodies in Contractual Party of the State/state-member. Thus, it's important to persuade the power bodies of national states in the necessity to fulfil the Courts' decrees with the help of national legislation, judge-made law and policy [6: 389].

G. Letsas [7], S. Maringele analyse the conceptions and doctrinal approaches as the basic ECtHR interpretation principles [8], while J. McBride outlines and characterizes main principles of the Convention interpretation, stresses tight relations between the Convention standards and general law [9: 8-9] and emphasizes the necessity to interpret its norms to gain the main objective – individual rights protection.

More and more scientists touch upon the problems of the ECtHR functioning, related with overloaded schedule of cases examination, but, at the same time, they prove, that the Convention “is the most effective system of civil and political rights individual protection”, contemplating how the ECHR interpretation principles allow the ECtHR judges to widen the sphere of its application [10: 66-7]. But, current state of the problems needs some generalizations and concrete definitions of practical interpretation principles use.

3. Argument of the paper

General and special methods of scientific cognition will be used in complex within the framework of the investigation. With the help of philosophical principles of dialectics and the form and content unity of the cognition object, the correlation of the “spirit” and the “letter” of the Convention of human rights and fundamental freedoms, the nature and essence of the Convention clauses interpretation will be determined, the subject and object of interpretation will be concretized, the main thing – differences in the approaches to interpretation principles understanding will be analysed. Systematic method will give the opportunity to establish an interplay between the principles and doctrines of interpretation and of practical use of the European Convention. Basing upon the hermeneutics method, the use of autolimitation and “court activism” in the Court practice, as well as subjective peculiarities of the interpretator (individual or collective), being sensible to the changes of current social-political situation, will be analysed. Comparative-legal method will be used to compare interpretational principles, applied by the ECtHR in different categories of cases.

4. Arguments to support the thesis

From the position of judicial activism and autolimitation the most significant ECtHR interpretation principles of human rights protection in the

countries of the Central-East, South-East Europe, former USSR and especially Ukraine were separated. The instances of the interpretation principles use in the EctHR cases, versus Ukraine in particular, give chance to display potential possibilities to widen the Convention of human rights protection application spheres and to perfect national legislation and legal-realization practice.

5. Arguments to argue the thesis

During its semi-sentennial activity in the Convention application, the Strasbourg Court worked out a set of its standards interpretation principles, determining the main foundations, basic ideas of their content understanding and allow to answer the main question – whether the country-defendant violates the Convention norms. In each precise case the choice of the Convention interpretation method must obligatory consider its peculiar nature as a “legal assistance” treaty. In particular, the ascertainment of this Convention content standards often makes the interpreter attach the decisive meaning to its object and aim (*Soering v. UK*) [11] with the possibility to ignore other means and techniques of interpretation. In other words, the interpreter’s attention should be fixed on human rights, relevancy assessment criterion of some actions, or the countries-participants’ of the Convention inactivity.

These principles don’t only “cooperate”, they supplement each other and create a certain system, which, in its turn, consists of separate subsystems according to the criterion of a separate doctrinal approach. Thus, on the official Council of Europe site there are following principles: purposeful (evolutionary) interpretation of the Convention, autonomous notions conception, state’s negative and positive obligations as to the rights and freedoms, guaranteed by the Convention, appendantness, proportionality, equitable satisfaction, “discretion bounds” of the state, horizontal application of the rights and their hierarchy [12]. J. McBride enlarges this enumeration with the principles of minimal guarantees, absence of reciprocity (states’ obligations according to the Convention) and territorial limitations, balance of interests and universal use [13]. But, all of them are to ensure the Convention on human rights Preamble tasks [14].

The change of concrete historical conditions of social development leads to the filling of abstract standards with a new precise content in each case of their interpretation. Interpreter’s (individual or collective)

subjective characteristic features, sensitive to the changes of the current social-political situation, are a factor, generalizing the influence of new conditions on the available text interpretation.

Depending on the judge's creative work direction, M. Marochini divides the ECtHR interpretation principles into two groups. The first group personifies the direction of judicial autolimitation, when the judges use one of the four following interpretation principles: intentionalism, textovism, freedom of discretion doctrine, and doctrine of fourth instance [14: 18], Art. 31(1)]. The second approach is judicial active participation, when judges engage in the interpretation of "living" interpretive tools: an instrumental doctrine or an evolutionary interpretation, the doctrine of effectiveness or innovation, and the doctrine of an autonomous conception [15: 67]. M. Morocini concludes that in the initial period of the function of the Court the first approach of its activity prevailed, and then the other ones joined it, and it depended on the composition of judges. The Court often did not justify the choice of one or another interpretation principle. However, "court active participants" are more appropriate to protect the object of the Convention. The application of most of the principles, according to the Convention, is quite controversial [15: 83]. Supporting these ideas, it is expedient to consider psychological principles of interpretation in their context.

Formulated by the ECHR in the case of *Airey v. Ireland* [16] legal position – "The Convention guarantees not theoretical and illusory rights, but the rights that are practical and effective", has played a decisive role in determining its role in the European system of human rights protection. The need to put into practice effective protection of rights and freedoms, has led the Court to apply this approach to the interpretation of the rules of the Convention, which allows it to expand constantly the guarantees provided by the Convention. From this point of view, the principle of effective and dynamic interpretation of the conventions in the practice of the Strasbourg Court has in fact become the way of improving the use of Convention's potential abilities. In particular, it concerns the possibility of Court's access to the persons recognized as incapacitated (case *Stanev v. Bulgaria* [17]), etc. The European Court of Justice in Ukraine has stated that the approach followed by national legislation, according to which persons recognized as incapacitated, have no right to immediate access to the court in order to

renew their civil capacity, which does not correspond to general European tendencies.

The principle of proportionality and the balance of interests is used to balance, if necessary, the three types of human rights and fundamental freedoms guaranteed by the Convention: absolute rights and freedoms that can not be violated in any way - regardless of the conditions existing in society; rights and freedoms to which only very narrow (specific) restrictions can be applied; rights and freedoms, the use of which may be connected with a number of wider formulated conflicting interests. Having analyzed the text of the Convention and its Protocols, we can conclude that the number of rights and freedoms set forth therein, which are subject to certain restrictions, constitutes the majority in comparison with absolute rights and freedoms. In this regard, the ECtHR controls that the restriction of the rights and freedoms applied in each case would not diminish the value of the relevant rights, as e.g. in the case *Hirst v The United Kingdom* [18].

In the judgment of the Court in March 2004, it was unanimously stated that the Government of the United Kingdom had violated Art. 3 Protocol No. 1 of the ECHR guaranteeing voting rights to prisoner. Convicted person does not lose the protection of other fundamental rights specified in the Convention, and therefore the right to vote must be accepted. It is not possible to punish all prisoners deprived of this right, regardless their crimes or individual circumstances, since there is no rational connection between the punishment and the offender. Deprivation of civil rights was a serious violation of the fundamental right to vote protected by the European Convention, i.e. the principle of proportionality was violated as well. Consequently, any decision to impose deprivation of rights as a punishment should be obligatory, relevant and adequate.

A number of further decisions (*Calmanovici v Romania* [19], *Frodl v Austria* [20], *Scoppola No 3 v Italy* [21]) stressed the importance of the principle of proportionality stated in the Hurst's original decision. In the case of *Frodl v Austria*, the ECHR ruled that the deprivation of the civic rights of all prisoners serving in Austria for more than one year was unlawful and stressed the need to differentiate the use of punishment according to the nature and seriousness of the crime. These decisions allow to assume that any judgement concerning the deprivation of civil rights must be adequate to the offense. Thus, the deprivation of civil rights may be legally imposed only on

a very small number of prisoners convicted for election fraud or election-related crimes.

However, in the UK this decision has become quite problematic. In December 2009, the Committee of Ministers adopted Interim Resolution CM / ResDH (2009) 160 10 [22], in which it called for the UK authorities to take urgent measures to implement the ECtHR decision before the general election in 2010, but they did not do it before the election, and it was a clear breach of the United Kingdom's obligations under the European Convention. It is evident that in the question of electoral rights, Britain is considered to be a model of democracy, and shows the predominance of political interests over the supremacy of law. Such problems are usually faced by East European and post-Soviet countries, Ukraine in particular.

The specifics of the ECHR as a supranational body designed to oversee compliance by States with their obligations under the Convention as to the Protection of Human Rights and Fundamental Freedoms requires to consider to take into account not only the European standards in the field of human rights fixed in the Convention rights, but also cultural, political, social, economic and other peculiarities and realities of the countries concerned. Moreover, taking into consideration the subsidiary nature of its jurisdictional powers, the Strasbourg Court is constantly willing to recognize the prerogative of States Participants to decide which restrictions on human rights and freedoms are adequate and appropriate in the specific circumstances [23: 253.]. Such approach of the Court has been reflected in the doctrine of the limits of independent consideration of States Participants, which has become a peculiar principle of interpretation of the provisions of the Convention. The essence of this principle is that the duty to apply, interpret and specify the rules of the Convention is, first and foremost, the responsibility of the national authorities. The main task of the ECHR is to ensure that the actions of States do not go beyond the limits of the Convention. The question is, what are the measures of its discretion.

In the case of *Brogan and Others v. The United Kingdom* [24] of the four plaintiffs in Northern Ireland who were detained without being brought to the judicial authority from four days and six hours till six days and sixteen and a half hours. That is, the arrests in these cases were carried out to interrogate and detect the facts sufficient for prosecution, although there was no evidence for any accusation against them.

The Government argued that, given the nature and extent of terrorism's threat, as well as the difficulties to obtain evidence sufficient to prosecute, the law provides maximum seven-day detention period which is necessary to overcome this threats. The court resolved the question whether Article 3 of the Art. 5 of the Convention, the applicants were detained during that period without being brought to trial.

The limits of this freedom are determined by the Court: if there is a European norm for two days, then three days may be considered appropriate, but four days - no longer corresponds to this criterion. Ensuring a fair equilibrium between the interests of a society that is suffering from terrorism and the interests of a particular person is an extremely difficult task, and national authorities that, thanks to long and painful experience, are far better understanding the methods of effective fight against terrorism and the protection of their citizens (when the judge of an international court, aware of this problem only through print media, can only dream of such an understanding) are, in principle, better prepared to determine this equilibrium than the judge of an international court. That is, the state is allowed a degree of discretion in the commission of actions concerning the Convention.

Given the diversity of legal systems in the member states of the Council of Europe, the ECtHR deals with a large number of legal concepts that do not have a common terminological definition in various European countries. In order to ensure that the applicant's rights are violated, the Court can give its own autonomous definition of the term according to the object, purpose and spirit of the Convention, which is the content of the principle of autonomous interpretation. M. Morocini points out its interesting peculiarities: "Firstly, the applicants allege a violation by challenging its national significance as defined by the state in accordance with the legal concept, and secondly, even if the state fully guarantees the protection of the right, the Court will seek a violation, since it was not done for all the necessary cases" [10: 76]. For example, in the case *Intersplav v Ukraine* (9 January 2007), the applicant complained about the refusal to refund the VAT paid by him in the course of his business, as well as compensation for the delay in his payment. The ECHR has indicated that "the concept of" property "in the first part of Article 1 of the First Protocol (994_535) has an autonomous meaning which does not depend on the formal classification adopted by the national legislation" [13] and

emphasized that the dispute concerns the applicant's general law in accordance with the Law of Ukraine "On Value Added Tax". (168/97-VR), therefore the applicant had enough reasons to rely on both VAT refunds and compensation for the delay in his payment. This case demonstrates the practice of the ECtHR of combining several interpretative principles. The court also applied the principle of "discretion" of the state to determine the public interest, but pointed out the illegality of the refusal to refund VAT, referring to abuse in this system as a whole, without evidence of violations by Intersplav and lack of necessary legislative and administrative measures to resolve the problem.

The combination of these principles is also observed in the case cited above by *Brogan and Others v. The United Kingdom*, which also states that there is no such offense as "terrorism" in Northern Ireland (as defined in paragraph 31 of the judgment of the Court). The law does not require a detained person to be informed of any particular criminal offense in which he or she may be suspected, as well as does not require that the interrogation of the person has to concern the offenses in which he is suspected [24].

The art. 53 of the Convention provides such an important principle of interpretation as the principle of ensuring the minimum guarantees of human rights and freedoms: "Nothing in this Convention should be interpreted as restricting or violating any human rights and fundamental freedoms which are guaranteed by the laws of any High Contracting Party or any other agreement to which it is party" [13]. That is, if in the Convention (as well as in the ECHR practice) are established lesser guarantees of human rights than in national legislation, the state can not, by referring to the Convention or the interpretation of its norms, implemented by the ECHR, violate or restrict the rights provided by the national law. The state is also obligated to comply with other international human rights treaties to which it is a party. So when considering the case of *Brannigan and McBride v. The United Kingdom* [25] on the violation of the right to liberty and security of person (Art. 5), the right to an effective remedy (Art. 13) and the possibility of non-compliance with the conditions of an emergency (Art. 15), which was not officially proclaimed, the ECtHR was compelled to be guided not only by the norms of the Convention and national law, but also the international at the request of the applicants and international non-governmental organizations - Amnesty International and Liberty. In particular, the Court analyzed international standards such as the 1988 United Nations Principles

on the Protection of All Persons subject to Detention or Imprisonment in any form (General Assembly Resolution 43/173 of 9 December 1988) and article 4 of the International Covenant on Civil and Political Rights of the United Nations of 1966, which are in force in the United Kingdom [25] for the purpose of officially announcing a state of emergency.

The Brannigan and McBride v. The United Kingdom and *Brogan and Others v. The United Kingdom* cases are an example not only of the combination of principles of interpretation by the Court but also demonstrate the combination of the manifestation of two models of judges' behavior: activism and self-restraint, an extreme situational complexity and ambiguity, which manifests itself in the decisions of the special thought and refinement of the judges and testifies to the Court's adherence to "The fourth instance" doctrine. The essence of this doctrine is that the ECHR is not the highest appellate body ("fourth instance") with regard to decisions of national courts that apply national law. In the case of *Strizhak v. Ukraine* [26], the ECHR has especially emphasized that the plaintiff's complaint about the chairman's deputy of the regional court was considered by the same court, the examination was conducted without the participation of the plaintiff and there was no evidence that he was previously notified of such a hearing, the Court found violations of the principle of parties' equality.

The interpretation of this article by the court in the case *Pronina v. Ukraine* [27] led to further improvement of the pension legislation of Ukraine, its compliance with European standards. The complaint to the national courts referred to the plaintiff's claim to the social security authorities to increase the amount of the pension to the living standards minimum (in accordance with Article 46 of the Constitution of Ukraine). However, national courts of all instances did not respect the norms of the Constitution as rules of direct power. The ECHR recognized a violation of Article 6 § 1 of the Convention because the national courts ignored the plaintiff's main argument, although it was very specific, relevant and important, but noted that it was not within its competence to decide "which way could be more adequate for national courts considering this argument." However, it is difficult to delineate the validity of decisions by national courts and the "fourth instance" doctrine in practice, so the interpretation of the ECtL of such cases is invaluable.

The latter principle is of paramount importance to Ukraine, where the domestic, national law of the state is not yet fully in line with the

Convention, and in the case of its successful adaptation, it alone can not protect itself from a violation of human rights by its mere existence. Only the practice of applying the provisions of the Convention, according to J. McBride, is decisive in respect of its compliance, since the understanding of the mechanisms of interpretation and application of the rules of the ECHR Convention in specific cases can serve as a practical guide for national courts in interpreting and applying the law, “thus guaranteeing that taken under Article 1 of the European Convention, the obligation to ensure the rights and freedoms set forth therein will be duly executed” [9: 16].

6. Conclusions

The investigation and study of the principles for the interpretation of the Convention about the Protection of Human Rights and Fundamental Freedoms are important in terms of improving the efficiency and effectiveness of the interpretation activities both the European Court of Human Rights and national authorities applying the Convention, where predominantly techno-dogmatic methods of interpretation are spread and there are no sufficient skills to use precedents in law enforcement practice, judicial, in particular. Furthermore, judges in their practical work use translations of cases which were considered at the beginning of the Convention, and do not correspond to the current realities of life.

Comprehension and clarifying the principles of interpretation of the Convention provisions and their practical application to the decisions of the ECtHR allow not only to solve the problems of legal proceedings, but rather the problems of social regulation, political, economic. Interpretative principles are an important basis for ensuring the proper implementation of the right to a fair trial at the national level. Examples of judicial active participation of the ECHR are encouraging the search for new potential opportunities for the ECHR to protect human rights.

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