THE EUROPEAN COURT OF HUMAN RIGHTS, ITS JUDICIAL LAWMAKING AND ITS IMPACT ON THE CASE LAW OF NATIONAL COURTS

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Abstract: The article examines the problem of legal qualification of the legal positions of the European Court of Human Rights. Various aspects of the functioning of the European Court of Human Rights in the context of the human rights protection system are considered. The article deals with the issue of the influence of legal positions on civil law. In addition, the possibility of judicial law-making is consistently proved. The existing approaches to understanding the nature of the legal position of the court are summarized. It is shown that the European Court of Human Rights, when interpreting certain provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms, focuses on its own decisions made earlier. A distinction is made between the terms "legal position" and "decision of the European Court of Human Rights".

Keywords: Convention for the Protection of Human Rights, International experience, European Court of Human Rights, Lawmaking, Legal position.

1 Introduction

The principle of universal respect for human rights and fundamental freedoms is one of the universally recognized principles of international law. For decades, a unified system of human rights protection has been formed on the European continent within the framework of the Council of Europe, which basically meets the requirements of international law. The main body of this system is the European Court of Human Rights (ECtHR), which operates on the basis of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its Protocols. Since the adoption of the Charter of Fundamental Rights of the European Union in 2000, one can talk about the development in of the EU law' own mechanism for the protection of human rights and fundamental freedoms, which was required due to the need to protect rights from abuse by EU institutions.

The existence within the framework of the European Union and the Council of Europe (hereinafter referred to as the CE) of their own mechanisms for the protection of human rights and fundamental freedoms gives rise to conflicts, including due to different interpretations of human rights norms by the judiciary of the above-mentioned international organizations. Avoiding conflicts, as well as forming a single European system in this area, is possible only in the process of close cooperation between the Court of Justice of the European Union (the EU Court of Justice) and the ECtHR.

The European Court of Human Rights is an international judicial body, its jurisdiction extends to all member states of the Council of Europe that have ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms [1]. The European Court is called upon to ensure the observance and implementation of the norms of the Convention by its member states. Considering and resolving specific cases accepted by the Court for proceedings on the basis of individual complaints filed by an individual, a group of individuals, or a non-governmental organization, the Court implements its tasks. It is also necessary to take into account that it is possible to file a complaint about a violation of the Convention by a member state of the Council of Europe from the side of another member state. The European Court throughout its long history has considered thousands of cases, most of which were complaints from citizens [2, 5]. When lodging an application, the strict rules and conditions of the European Court of Justice must be taken into account. So the subject of the complaint can only be violated rights, which are guaranteed by the Convention or its Protocols. It should be noted that the list of these rights is quite wide. However, the jurisdiction of the European Court extends only to the Convention for the Protection of Human Rights and Fundamental Freedoms. It should be borne in mind that a complaint can only come from the victim himself; if a complaint is filed by a group of people, each filer must indicate his personal claims. There are also procedural deadlines in the rules for filing complaints it must be filed no later than six months after the final consideration of the issue by the competent state body. One of the important criteria for filing a complaint is the exhaustion of all domestic remedies of one's right and, above all, judicial remedies; only after that the complaint can be declared admissible on the merits. It should be noted that the European Court is not the highest court of a member state, however, but namely the European Court of Human Rights can be regarded as a guarantor in ensuring human rights and freedoms in case of violation of civil, housing, property rights.

When used by an international court, the doctrine turns from a theoretical, sometimes abstract concept into a practical tool for solving the problems facing the Court. Researchers note that in this way the doctrine turns into a legal principle and a method of resolving court cases based on the achievements of the theory of law [11]. Of course, the formation of a doctrine does not take place momentarily: many factors influence its origin, evolution, and approbation [37]. However, it seems unequivocal that the ECtHR, as one of the most demanded bodies of international justice, has an objective need for judicial doctrines: they are designed to streamline case practice, facilitate (as far as possible) the resolution of the most complex and controversial cases, ensure uniformity of applied approaches, etc.

The significance of judicial doctrines is also sound for the interpretation of Article 6 of the Convention. The evolution of the interpretation of the right to a fair trial and the evolution of the doctrines formulated by the Court took place in close conjunction with each other. Indicative one, for example, is the evolution of the efficiency doctrine based on Article 13 of the Convention. This doctrine was first applied in Golder v. United Kingdom, in which it was said that the applicant was deprived of the opportunity to initiate a lawsuit and take advantage of the guarantees enshrined in Article 6 ECHR. The British government insisted on a fairly formal reading of Article 6 of the Convention, which did not imply that the applicant had a right of access to the Court. However, this approach was rejected by the Court on the grounds that it deprives the right to a fair trial of effectiveness and makes it too formal [3]. The legal position of the ECtHR in the Golder case laid the foundation for the formation of the concept of access to justice, to which the Court subsequently turned more than once.

At the same time, the practice of the European Court of Human Rights also influences the practice of national courts. Thus, it seems appropriate to consider in a complex judicial lawmaking of the European Court of Human Rights and its impact on the case law of national courts.

2 Materials and Methods

The theoretical basis of the work is the scientific works of scientists, both on general issues of international law and on international human rights law, international procedural law, international judicial institutions, and the law of international organizations.

The normative base of the research consists of international legal acts and international documents. International legal acts include the UN Charter, the Charter of the Council of Europe and the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, which is the founding act of the ECtHR. Numerous treaties in the field of human rights protection, both universal and regional, are also used, the

practice of the ECHR on the application of the provisions of the Convention, internal acts of the ECHR (its rules), as well as various documents adopted by the Parliamentary Assembly of the Council of Europe, the Committee of Ministers of the Council of Europe, and others acts are considered [12-14, 18].

The subject of scientific research involves the use of certain scientific methods to conduct an objective and comprehensive study of the international legal nature and international legal status of the ECtHR and its impact on the development of international human rights law. For a more complete disclosure of the content of the topic, historical, comparative, normative, systemic, logical methods, the method of system-structural analysis and the method of comparative law are used.

3 Results and Discussion

The main international treaty at the European regional level is the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms adopted within the Council of Europe (hereinafter referred to as the Convention), to which 47 states are currently parties, that is, almost all states of Europe (in the geographical sense of this term, with the exception of Belarus). In the Convention, only some of the human rights proclaimed in the Universal Declaration of Human Rights of 1948 were enshrined the main ones, in the opinion of its developers, without the possession of which and their effective implementation, a person in a democratic state would be unthinkable.

During its existence, the control mechanism of the Convention has gone through a long evolutionary path from a mechanism with a predominance of quasi-judicial functions and a high role of states in its functioning to a truly independent international control mechanism, the basis of which is the international court [18, 20-26]. As a result, the activities of the control mechanism of the Convention began to be considered, first of all, as the activities of the European Court of Human Rights.

The European Court of Human Rights was one of the first international courts. In the years that have passed since the beginning of the activities of the ECtHR, the number of international judicial institutions has multiplied many times, and the peak of their creation fell on the last quarter of the 20th century. The international community has entrusted international courts with the vital task of maintaining international law and order by ensuring the peaceful resolution of international disputes [29, 30, 32]. The study of international judicial institutions is one of the most urgent tasks of the theory of modern international law.

The legal nature of the European Court of Human Rights has an international legal character. Statements about the supranationality of the ECHR or the presence of signs of supranationality in its activities do not correspond to either the doctrine of international law or the practice of international relations, including the practice of the ECtHR itself. The activities of the ECHR testify not to its supranationality, but to such a progressive phenomenon in modern international law as the strengthening of its (law) normativity and the strengthening of the international order based on law and human rights [8]. The ECtHR is an international court, an independent subspecies of international judicial institutions, which, in turn, are a type of international institutions (associations of states), and this is how it should be called in order to avoid semantic confusion. The uniqueness of the ECtHR as an international court lies in the fact that it is the first international court that combines the consideration of interstate disputes and control functions.

Namely the presence of the ECtHR as a control mechanism provided the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 with a special place in the system of sources of international human rights law. The authority and high legal quality of decisions and legal positions of the ECtHR has a significant impact on the practice and institutional structure of other international judicial institutions. In addition, the successful experience of the ECHR has played a decisive role in the establishment and approval of such international courts as the Inter-American Court of Human Rights and the African Court of Human and Peoples' Rights.

As a result of its activities, the ECtHR ensures the effective implementation of the norms of international human rights law not only at the international, but also at the domestic level [34-36]. This fact also indicates the recognition of international legal regulation by states in the field of human rights and contributes to the development of international human rights law as an independent branch of international law.

The ECtHR pays much attention to the effectiveness of domestic legal remedies, especially the courts. The ECHR has repeatedly emphasized that it is only a subsidiary means of protecting rights and freedoms and that the main responsibility for their observance lies with the member states. Namely the international legal nature of the ECtHR and its status as an international court empowered to make legally binding decisions allowed it to play a decisive role in the emergence of one of the main branches of modern international law International Human Rights Law in a short time.

Recently, a large number of studies have appeared on the functioning of international mechanisms and procedures in the field of human rights, among which absolute leadership is held by works on the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and its control mechanism. However, most of these works are devoted specifically to the procedural aspects of the operation of the control mechanism and the analysis of the content of conventional rights. Many authors focus on the procedure for filing a complaint with the ECtHR, which is due to practical necessity [4]. Certain studies are also being undertaken in the direction of international judicial institutions. Unfortunately, with rare exceptions, the works are devoted to describing the activities of such institutions and analyzing their practices.

Meanwhile, through the judicial interpretation of the European Convention, the general European norms on human rights and fundamental freedoms are put into practice. It is not safe to argue that the acquired European unity will easily strengthen its position through the implementation of jus commune, which aims to harmonize fundamental rights, while maintaining the necessary diversity of national legal systems, as well as through the political and economic organization of Europe [6]. Although this arrangement is legitimate and necessarily seeks to unify, it generates inevitable divisions that are ultimately difficult to accept in terms of principles, as they concern societies that, in their own way, reflect the richness of European civilization.

Through the establishment of the European Court of Human Rights, the European Convention, as emphasized earlier, introduced an element of innovation into international relations. The Center for Permanent Lawmaking, inherent in the European Convention and independent of the purely national dimension, checks the conditions of admissibility, establishes the facts, conciliates the parties and decides on the merits of individual complaints (and very on rarely state complaints) [38-40]. This European judiciary, which stands above the national judiciary but does not replace them, shows considerable flexibility, since, in deciding on individual cases, it succeeds in isolating guiding principles designed to regulate the behavior of national authorities and, in particular, the behavior of the legislator, lawyers, and practitioners (judges and lawyers). The activity of the European Court of Human Rights has had a significant impact on the approval of fundamental human rights, the development and expansion of their content, including such fundamental rights as the right to life and the prohibition of torture, as peremptory norms of international law, binding on all states and other subjects of international law. Based on the experience of the ECtHR, universal and regional international legal acts in the field of human rights were developed and created, the provisions of the Convention in the interpretation of the ECtHR were enshrined in the legislation of various states of the world that are not parties to the Convention.

Judges (international or national) are not involved in the daily work of rule-making. Their professional duty is mainly to decide a particular case on the basis of existing laws. They do not intentionally change the laws, realizing that this applies to the legislative branch of government. At the same time, in order to resolve the dispute, starting from the existing rule of law and comprehending all possible meanings and meanings, they, interpreting it, seek to try on the facts of a particular case. All of the above are the stages of judicial lawmaking, which culminate in law enforcement. A specific norm is interpreted from the point of view of the goals and intentions of the legislator, taking into account the history and linguistic manifestations of the law as a whole. That is, the creation of law requires the use of a systematic approach. In cases where the methods of interpretation used cannot cover the range of issues raised by the circumstances of the case under consideration, which urgently require the introduction of a new element, judges give the legal norm a new meaning, and this is the essence of what can also be called law-making activity [9, 15].

The composition of the European Court reflects the different legal systems, in which the professional views of judges were formed, and while jurists trained in the continental system draw their rationale from legal principles, jurists educated in the common law tradition turn to precedent. As a result, such interaction helps the Court to combine respect for the law with the consistency of its practice. At the same time, in any case, there are two important deterrents: the text of the law and the social nature of the problem to be solved. The restrictions in question should not be taken as a constraint on judicial freedom, but as conditions that must be observed. The legal norm, for all the brevity of its textual presentation, can be approached differently in terms of options, scope, and limits of interpretation. Problems of a social nature require a cautious approach. However, it is possible that judges will face a paradox, which lies in the very meaning of judicial activity. When interpreting norms, judges usually look for a social meaning that accurately reflects the needs of society and gives their law-making mission a special role, significance, which is very important for maintaining their authority and respect. The combination of two principles social conditioning and justice support incentives for judicial lawmaking [9]. Thus, the social nature of the restriction is a rather thin line, the observance of which requires deep knowledge, experience and wisdom from the judges. It seems that the current logic of development will require international courts to cooperate more actively in implementing the concept of economic conditionality of many rights, responding to two serious challenges: the economic crisis and populist democracy. The abstract reaction involves achieving a balance between good governance and the improvement of the economic system and the observance of social human rights.

The active intervention of judges in the form of law-making must be accompanied by public consent, that is, judges have to be receptive to the subtle sensitive sphere of society's needs. This, perhaps, explains the emergence and widespread use of the doctrine of consensus by the ECtHR. Considering the questions raised by the Court's law-making function, former Judge of the Court Mahoney believes that in exercising such vast powers, judges must be able to self-restraint by recognizing and respecting the decisions of "other actors in a democratic society". He calls the condition for the judges' exercise of their powers a "contract of trust", which they must not violate [19].

There are two important pillars, foundations that represent a condition for the development of international justice - judicial law-making and judicial precedent, which have been developed in the practice of the Strasbourg Court in the context of the protection of human rights. Both of them are of fundamental importance for the evolution of human rights law, which requires an in-depth analysis of the facts of the case, the meaning of the applicable norm, the search for new elements and criteria for interpretation aimed at legal certainty and real shifts in law that capture and respond to progressive factors of social development.

The authority and high legal quality of the decisions and legal positions of the ECtHR allow other international judicial institutions to use its practice to establish the content of the norms of international human rights law. The positive experience of the establishment and development of the ECtHR played a significant role in the creation and development of such international courts as the Inter-American Court of Human Rights and the African Court of Human and Peoples' Rights [10, 11].

The activity of the ECHR is one of the main instruments that ensure the effectiveness of the norms of international human rights law both at the interstate and national levels. Moreover, the effectiveness is achieved not only by the direct execution of the decisions and resolutions of the ECtHR by the states parties to the Convention, but also by the influence of the authority of the ECtHR and its activities for the legal consciousness of national law enforcers.

The Strasbourg jurisprudence guidelines deal both with the keys of reading, which are the principles of interpretation and which allow understanding the logical course of legal reasoning (among other things: autonomy of concepts, efficiency, proportionality, margin of appreciation, positive obligations), as well as technical aspects that relate to specific areas procedural law (fair trial, custodial dispute) and to the classical realms of human rights (right to life, prohibition of torture) and fundamental freedoms (privacy, freedom of expression, property rights).

However, lawyers, judges, and other officials very rarely base their activities on the practice of the European Court. They themselves often say that they do not know how to do it [16, 17, 33]. It must be said that even before the first reform of the European Court in 1998, the number of documents decisions and rulings that had a precedent character, amounted to hundreds and even for an experienced lawyer it was very difficult to navigate them.

In addition, as a rule, only particularly significant court decisions acquire a precedent character. Formally binding only for the disputing parties, such a decision in fact becomes an independent source of law [27]. However, it seems rather difficult to develop criteria by which these "particularly significant" decisions can be distinguished.

Some authors express the opinion that a new source of law has appeared international judicial precedent [41]. In fact, the decisions of the ECtHR are the norms of the Convention in their dynamics and development. The ECtHR itself has repeatedly expressed its position in the wording: "The Convention is a living instrument and must be interpreted in the light of today". This type of interpretation in the legal literature is called dynamic-evolutionary [28]. One can claim that for the state, decisions made not only in respect of a case where it is a party, but also in respect of other member states of the Council of Europe, are binding.

Analyzing the decisions of the ECtHR as an act of interpretation of law, the following features can be distinguished: they contain general rules of conduct for their explanation, therefore the decisions of the ECtHR are acts of an authoritative judicial body, and not just normative rules; they are addressed, as a rule, to the participants in the process and are binding. However, unlike the act of interpretation, the decisions of the ECtHR also contain normative instructions, have independent significance and, most importantly, include a decision on the case.

In addition, acts of interpretation are not a form and source of law. Experts believe that "the ECHR, in the process of deciding on a particular case, creates a rule of interpretation" [4]. At the same time, denoting the signs of this norm, the author actually enumerates the signs inherent in the legal positions (ratio decidendi) of the ECtHR.

References to the legal positions in the final judgment, which are developed and applied by the ECtHR in earlier judgments, as

well as new norms that concretize the Convention, provide an opportunity to talk about the degree of their binding. The state is able to take steps in the legislative, law enforcement sphere (to comply with an international treaty the Convention) precisely thanks to the legal positions contained in the decision of the ECtHR.

In the legal literature, there is also an opinion that the decisions of the ECtHR are law enforcement acts, and, therefore, they cannot be considered part of any national legal system 16 However, unlike a law enforcement act, the decision of the ECtHR is valid not only for strictly defined situations and persons, but also applies to similar cases in the future, and most importantly, it is designed for repeated use. To confirm this point of view, it is worth referring to the case of Pretty v. the United Kingdom [31]. The ECtHR argued about the precedent nature of decisions in specific cases to a greater or lesser extent. In fact, the decision Pretty v. the United Kingdom itself was passed and regarded by the ECtHR in such a way that "neither from a practical nor from a theoretical point of view, the Court sees no obstacles to prevent its application in future cases". At the same time, the applicant's lawyer argued with the ECtHR that the violation of the Convention did not create a precedent in the present case [10].

As M. Entin notes, "Due to the international legal custom formed in Europe and the evolution of constitutional traditions, the decisions of the ECtHR are considered by the member states of the Council of Europe and their judicial bodies as having precedent value, as a common standard, the observance of which is legally binding" [7].

However, the evolutionary interpretation of the norms contained in the Convention is a reflection of the modern development of European society, the trend of legal regulation in the member countries of the Council of Europe. The analysis allows making the following generalization: in fact, every decision of the ECtHR contains an interpretation of the norms of the Convention and its protocols, i.e., gives its normative interpretation. In addition, the decisions of the ECtHR are a precedent for interpretation, a law enforcement act.

The nature of the decisions of the ECtHR is triune it includes signs of an act of interpretation, a law enforcement act, a precedent of interpretation. The center, the core in this understanding is the precedent nature of the decision of the ECtHR, while the presence of legal positions in the structure of decisions of the ECtHR gives it the characteristic of a precedent decision.

In other words, by applying and interpreting the Convention within the framework of a specific case, the ECtHR creates new legal positions in specific circumstances. Decisions of the ECHR can be perceived as acts containing certain rules of law (rules, legal positions) that should be applied when considering similar cases by subjects of law: member countries of the Council of Europe.

For some national courts, not the entire decision is binding, but that part of it that sets out the legal positions of the ECtHR. Therefore, it is necessary to rely on the reasoning part of the decision of the ECtHR when considering the case. However, it is not entirely correct to consider the legal positions of the ECtHR as a source of law, its external expression, since positions represent a rule of law, and the decision of the ECtHR is recognized as a source of law.

In this vein, it is interesting to demonstrate the way in the issue of recognition of judicial lawmaking in European and American law. Thus, Karapetov expresses the opinion about "the impossibility of avoiding judicial lawmaking both in the implementation of gap lawmaking and in the interpretation of the norms of the law. There is judicial law-making, since it is simply impossible to avoid it" [27]. The scientist also notes that "the trend fully corresponds to the all-European line of involving the courts in active lawmaking" [16]. Here, the scientists meant the extremely active law-making of the ECtHR, as well as the European Court of Justice, which have long assumed the competence to create legal norms based on the interpretation of the extremely abstract principles of the Convention and the fundamental normative treaties that underlie the European Union, respectively" [41].

Indeed, the legal positions of the ECtHR and the European Court can be attributed to "legislative innovations", which were one of the main driving forces of European integration. By interpreting the fundamental documents, giving them "pro-integration" interpretations, the European judicial authorities are doing what the member states of the European Union and the Council of Europe did not expect when concluding international treaties. It is not surprising that in many countries of continental Europe, where a normative legal act occupies a dominant position as a source of law, the decisions of the ECtHR are judicial acts that are officially recognized as a source of national law.

4 Conclusion

It can be assumed that in the field of protecting human rights and freedoms, the legal positions of the ECtHR affect the rule-making activities of the national bodies of the member states of the Council of Europe, since after identifying a contradiction between national legal acts and the legal positions of the ECtHR, the state is obliged, in accordance with an international treaty, to bring its own legislation into line with the norms of Council of Europe law and decisions of the ECtHR.

Whatever meaning the legal science of the countries of different legal families puts into understanding the judicial precedent, in any case, it is based on the legal position (in our case, the legal position of the ECtHR). The new legal position independently developed by the ECtHR is a rule-making component of the decision, which is the source of law for any member state of the Council of Europe. The above conclusion also points to the demarcation of the concepts of "legal position" and "court decision", which should not be considered equal.

As a main conclusion, let us clarify that the decisions of the ECtHR have a rule-making component, which is contained in the legal positions of the ECtHR. The legal positions of the ECtHR are understood as the rules of conduct developed by this court by concretizing the norms contained in the Convention and subsequently applied in resolving similar cases. At the same time, consideration of national civil legislation through the prism of the legal positions of the ECtHR reveals the possibility of improving national private law as well.

It is important that the legal positions of the ECHR, reflected in the decisions, make it possible to predict the further forward movement and evolutionary development of civil legislation and law, taking into account all-European trends. In this regard, a certain "privilege" is given to the states parties to the Convention, since it is possible to use the developments of the ECtHR for national legal needs, which already accumulate experience, progressive legal developments in the field of protecting the rights of individuals.

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