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КОНФЛИКТ ПОЗИЦИЙ ЕСПЧ И ОРГАНОВ КОНСТИТУЦИОННОГО ПРАВОСУДИЯ

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В статье исследуется вопрос восприятия позиций ЕСПЧ конституционными судами и иными органами конституционного правосудия различных стран; раскрываются виды восприятия; подробно описывается такая форма восприятия как конфликт конституционного суда с позицией ЕСПЧ; изучается одна из возможных причин конфликта – оценка обоснованности ограничения прав заявителей по делу; делается вывод, что конфликт – исключительно редкое и преодолимое явление во взаимодействии ЕСПЧ и национальных конституционных органов.

Ключевые слова: Европейский Суд по правам человека; Конституционный Суд; правовые позиции; обоснованность; конфликт позиций.

CONFLICT BETWEEN LEGAL OPINIONS OF ECHR AND NATIONAL CONSTITUTIONAL COURTS

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The object of research is a relationship between ECHR and constitutional courts in various jurisdictions.

The main aim of this article is to research the conflict between opinions of ECHR and national Constitutional courts, and also to find the root of this conflict.

The methodology of this research consists of universal methods (such as analysis, synthesis, comparison) and jurisprudence-specific methods.

In the course of research, the author used various theoretical sources, ECHR case-law and decisions of various national Constitutional courts.

Results. At this point of time, there are many theories that try to explain the relationship between international and national law. But their functioning can be observed only in practice. Many jurisdictions adhere to the concept of Dualism.

National Constitutional courts may perceive legal opinions in two different ways: adhere to the legal opinion of ECHR or reach a different conclusion, different to that of ECHR.

Because national Constitutional courts and ECHR employ different systems for establishing whether rights of the claimant were violated or not, courts may give more weight to the different factors.

In the article, the author focuses attention on such reason of the conflict as justification for limitation of one's rights.

Conclusions. Conflict of legal opinions of ECHR and national Constitutional courts is of axiological nature. Conflict *per se* does not imply that a given national government decided to breach its international obligations. Because of subsidiary nature of ECHR protection, conflicts is rather an exception that could be dealt with than a rule.

Keywords: European Court of Human Rights; Constitutional Courts; legal opinions; justification; conflict of opinions.

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1. Introduction

Recognition of the jurisdiction of the ECHR in the national legal order presupposes that the respondent country executes the decision of the court of the international organization, which proceeds from the principle of conscientious compliance by the country with international obligations assumed. Not the last role in this process is played by constitutional justice, guided in the protection of human rights primarily by the Constitution of its country.

The existing divergence in the positions of the constitutional courts and the ECHR raises the question of the admissibility of the existence of a divergence in positions: is this possible within the framework of the existing system of relations; are there any objective reasons for this? How exactly do the constitutional courts express their disagreement with the ECHR and on what issues?

2. Modern specificity of decisions of courts of international organizations

Issues affecting the correlation of national and international jurisdiction, the strength of decisions of international bodies, have their origin in the debate about the relationship between national and international law and order.

Monistic concepts suggest that international and domestic law should be viewed in a unified system of law: the norms of this or that rule of law will be of great legal force.

Supporters of the primacy of internal law explain the operation of the norms of international law to the extent and in the ways in which the state itself permits it. German lawyer A. Zorn reveals the nature of international law as an external law of the state, the norms of which take their force from the domestic law: "International law is legally a right only when it is a state right" [1]. The primacy of national law, however, denies the existence of another, international law as an independent phenomenon [2].

The concept of the primacy of international law over the domestic law was developed by the well-known Austrian lawyer H. Kelzen. Kelsen’s theory considers a single system of normative acts located in a certain hierarchy and subordinated to each other. The norms of international law, thus, constituted the "top" of the system of acts, endowed with greater legal force than those of internal law [3].

The theory of dualism, which arose in the XIX century, indicates the existence of two legal orders independently of each other [4, p. 111]. Initially, even the possibility of conflict between the norms of different legal orders was denied because they are not subordinate to each other and regulate different areas of relations: subjects, nature and content of legal relations in the two legal orders are different. In international relations, sovereign states act as subjects, and the powers of a sovereign state are subordinated to intra-state actors; therefore, legal orders are not correlative. Under the dualism of systems, the norms of international law do not operate directly within the state - it is the state that becomes a participant in the inclusion of norms from international law into its internal order (transformation) [5]. The norm continues to operate at the international legal level, becoming at the same time the rule of law in the domestic legal order, protected and implemented by national legal means and methods, but in accordance with international obligations [6; 7, p. 254].

The idea of the "constitutionalization" of the European Convention has the right to exist and the European Court of Justice: the former European Commission Member Professor E. Alkema, appropriates the Convention status of the "European Constitution", and the European Court - the status constitutional court [8]. The former Chairman of the ECHR Jean-Paul Costa notes that even in the classic case, Loizidou v. Turkey thr European Court of Justice named the Convention, as a constitutional instrument of the European public order" [9].

In practice, the question of the place of the Convention of the ECHR decisions (as the ECHR's activity on the interpretation of the provisions of the Convention) in the system of national acts is resolved ambiguously. States that adhere to the dualistic concept, differently define the place of the Convention and the practice of the ECHR in the system of national acts: in Germany they have the status of a federal law, in force below the positions of the Federal Constitutional Court [2]. In Bosnia and Herzegovina, the norms of the Convention are an integral part of national law, take precedence over the latter [10, p. 41]. In the United Kingdom conventional norms are not directly applicable, nor are they generally part of the national legal system [11]. According to W. Bernham, the Netherlands is the only monist state in which the norms of international treaties act directly, heading the hierarchy of national sources of law and prevailing over them [12, p. 1058]. Russia prof. J. Ovsepian and S. Patrakeev referring to moderate m dualism countries [13; 14].

To some extent, this causes a different perception of the ECHR's position - for example, in France, the Constitutional Council takes into account the acts of the ECHR and does not dislike its positions; The Constitutional Council is open to the perception and reevaluation of certain circumstances, according to which the European Court expresses itself differently than the Constitutional Council itself [15]. In the United Kingdom, in a number of decisions of the Supreme Court, the issue of binding decisions of the ECHR, the influence of its positions on the national legal order, was directly discussed; The Lords could disagree with the ECHR, speak differently on the issues considered by the European Court in cases against the United Kingdom [3]. At the same time in Germany, unlike France, the ECHR's positions did not sound convincing for the national courts when considering the case of Görgül (although it was necessary to take them into account) [4].

3. Specificity of modern international law and decisions of international organizations

A.I. Kovler rightly emphasizes that traditional concepts can no longer offer system solutions for overcoming emerging legal conflicts [16]. Modern international law acquires new features. Decisions of international organizations are binding because of the authority delegated to them to establish legal regulation, determine the obligations that States take on themselves by virtue of recognition of the jurisdiction of the organ of an international organization. The formation of separate bodies by international organizations, separate regulating relations without direct consent in each case of states, leads to a change in the nature of acts of such bodies of international organizations - they lose the features of acts of classical international law: their legal force arises from the power delegated by states to establish legal regulation. In continuation of this, let us note that, from the standpoint of the national legal order, the force of such acts of delegated rule-making is not identical with the force of those norms in the creation of which the state itself participated as a subject of international law, by the very process of their creation, and the decision of the ECHR, therefore, cannot be executed unconditionally.

Taking into account these features of the modern international legal order, it is possible that there will arise both contradictions between the positions of the ECHR and the bodies of constitutional justice, as well as the consensus on the issues under consideration.

4. Conflict in the perception of the decisions of the ECHR by the bodies of constitutional justice

The implementation of the ECHR decisions, the implementation of norms in the national legal order, is preceded by a separate process of perceiving the decisions of the European Court. In our opinion, perception has axiological meaning: an assessment by the national body of the ECHR's positions, its arguments and ideas derived from the decisions of the European Court. The key subject is the body, whose decisions are taken through the prism of existing positions of the ECHR.

According to the nature of perception, it is more appropriate to distinguish two opposing types: a conflict with the position of the ECHR and its adherence to it. Accordingly, the conflict of

perceptions is a different assessment of the issues raised by the European Court, the positions of the courts diverge. If the constitutional court follows the ECHR's position, its adoption, the consent of the national constitutional body with it, its registration in its activity and its application in the future is evident.

5. The reasonableness of the application of specific measures to restrict a person's rights is one of the reasons for the conflicts between the positions of the European Court and the bodies of constitutional justice

In addition to the consideration of the constitutional and Strasbourg courts, there are also limits to the limitations of the rights of specific applicants in the case. Courts resolve the question of the legitimacy of restrictions, following a certain algorithm. For example, according to the Constitution of the Russian Federation, restriction of the rights of a person is permissible under the observance of the criteria of part 3 of Art. 55 of the Constitution, which are disclosed and interpreted by the Constitutional Court of the Russian Federation in their decisions [5]: so, the restrictions should be justified by a really important public interest; are necessary (conditioned) [17]; are proportional (proportional , balanced) [18; 19, p. 5]. The ECHR in its practice uses its own set of criteria for assessing the limits of restrictions: the criteria are developed by the Court itself in its own decisions. Having become the subject of scientific research, this evaluation algorithm is called the "proportionality test" [20, p. 4-30]. The non-identity of the mechanisms for assessing the limitations of rights sometimes leads the courts to different conclusions on one situation under consideration.

5. 1 . The conviction of the court in the validity of the restriction of the law (validity of restriction is an important public interest)

Despite the differences in the criteria for the assessment, the courts (and the European Court of Justice, and Mr. Ana op constitutional justice) considering the validity of the public interest, for which the applicant's rights were restricted. Thus, in the ECHR Judgment "Maggio v. Italy", the ECtHR was not convinced of the validity (weight) of the public interest for which state interference in the proceedings [6] (within the meaning of Article 6 of the ECHR). The Italian government justified the actions of its state with three interests: financial interests; maintenance of the rule of law; the proportionality of social payments (the elimination of unreasonable payments to individual applicants, including), the ECHR was not convinced of the validity of any of the proposed interests. The Constitutional Court of Italy later in the judgment of 19 November 2012 in case No. 264/2012 commented on the judgment delivered by the European Court in the case of Maggio . And if the Strasbourg Court was not convinced of the existence of a significant public interest, the Constitutional Court of Italy was convinced of the existence of such: this maintenance of justice, the proportionality of pension payments, is unacceptable in the public interest to provide equal guarantees to persons paying various pension contributions. Thus, the Italian Constitutional Court considered the intervention of the legislator justified [7].

5 . 2. Justification of differences in the legal status of individuals

In Latvia, citizens of the Republic and non-citizens enjoy unequal rights in terms of social security; for citizens' procedure (proving the existence of insurance experience, the fact of military service in the territory of Latvia) and requirements is much easier to enter into the state pension insurance system. The fact of the difference between citizens and non-citizens serves as a "stumbling block" between Latvia and the ECHR until now.

The first episode is connected with the consideration of the complaint of a non-citizen Andreeva in the ECHR, whose work record was not taken into account when appointing a pension only on the grounds that she was not a citizen of Latvia: the Constitutional Court considered the

norms constitutional [8], and the ECHR, in turn, recognized this difference as discriminatory [9]. The Court found that the difference in treatment with the applicant was due only to the fact that she was not a citizen of Latvia; for all other criteria, the applicant was in the same situation as Latvian citizens with the same length of service; differences in the regulation of pension rights of individuals in the period of the USSR on any grounds for the citizenship of a single republic was not.

However, the problem of differences between citizens and non-citizens continues to exist: the last disputes were caused by a complaint from a group of non-citizens to the Constitutional Court of Latvia [10]. The court continues to insist on the validity of the difference in rights, explaining this by the occupation fate of Latvia (the continuity doctrine is paragraph 11.3 of the Decision), which was forced to put up with the policy of the USSR and accept immigrants, russifying the Latvian state, and therefore the restored state is not obliged to bear consequences for obligations USSR - the occupier. Non-citizens - immigrants during the periods of work experience outside the territory of Latvia did not make any contribution to the development and economy of the Republic. The Constitutional Court, thus, recognizes the legal relationship of non-citizens with Latvia, but different from the state's relationship with its citizens.

Thus, in our opinion, the Constitutional Court has weighed in again the values weighted earlier by the ECHR in Andreeva's case; recognized differences as justified by the grave historical fate of the Latvian state, pointed to their proportionality (but did not argue this in the decision). I think, on the issues of existence for non-citizens of a different order in Latvia, the Constitutional Court has taken an unchanged position, forcing obligations under the Convention. Perhaps, the case will take a new turn after the ECtHR decision on the complaint of non-citizens against Latvia [11].

Another example of the opposite assessment of the validity of differences in the legal status of individuals is the case of Markin v. Russia. Konstantin Markin appealed to the Constitutional Court of the Russian Federation, considering the absence of the right to leave to take care of a child from military men unconstitutional. The Constitutional Court of the Russian Federation is convinced of the validity of the differences in the status of male servicemen and women servicemen - differences in status are necessary to ensure the country's defense and security [12]; The European Court considered the differences discriminatory [13], lacking sufficient justification. In the opinion of A.I. Kovler, the ECHR violated the principle of subsidiarity under the adoption of the Resolution, not considering the arguments of the Constitutional Court of the Russian Federation sufficient, not agreeing with the previously chosen policy of the Russian legislator, having refused the priority of establishing national authorities of their public interest [16]. Separately from the Decree of the Constitutional Court in the Markin case, the Chairman of the Constitutional Court of the Russian Federation V. Zorkin insists on the validity of the disputed differences in the legal status of men and women with the special social role of the latter and the traditional views of Russian society [21].

6. Conclusions

The conflict of positions ECHR should not be equated to the refusal of the state of execution of the European Court's judgments; conflict positions are primarily of axiological character.

It should be noted that the conflicts are an infrequent phenomenon in the alternative, the operating mechanism for the protection of human rights and there is seldom a misunderstanding between the courts. The resolution of the conflict cannot be a result of unilateral interpretive activities of the Strasbourg Court: the more successful is the development of the dialogue between the courts investigated and mutual consideration of the legal positions [22, p. 133; 23].

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