

PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN DEFINING THE RANGE OF PERMISSIBLE RESTRICTIONS ON THE FREEDOM TO CONDUCT A BUSINESS

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Article info

Received –

2021 August 14

Accepted –

2021 December 10

Available online –

2022 March 20

Keywords

Business activity, the European Court of Human Rights, broad interpretation, economic rights, ownership, freedom to conduct a business

The subject of the article is the application of the concept of the range of permissible restrictions on rights and freedoms that not enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms in the practice of the European Court of Human Rights.

The purpose of the research is to identify the basic position of the Court on the question of determining the degree of proportionate balance between public and private interests in establishing restrictions on the rights and freedoms of a person in the sphere of business activity.

The methodology. In the process of the research, both general scientific and special methods of knowing socio-legal phenomena (formal legal method, circular causality method) were used. The multivariance of achieving common standards for assessing the range of permissible restrictions on the freedom to conduct a business is determined by analyzing the balanced influence of internal and external factors, the interaction of many dichotomies and adichotomies.

Results, scope of application. The provisions of the Convention define the range of rights and freedoms protected. However, the Court in its practice broadly interprets the list of rights and freedoms protected by the Convention. The Court considers the Convention as a "living instrument" in order to adapt it to changing conditions of public life. The Court's current practice does not imply that the Court has exceeded its powers. The court implements the idea of circular causality of legal phenomena, perceived including in European space. European tradition recognizes the possibility of changing the legal space in different ways. The main way of transforming the legal system is to change quantitative parameters. It is possible to accumulate the qualities of practical implementation of the principles enshrined in the Convention by ensuring the realization of human rights and fundamental freedoms. Investigators of the Court's practice mainly analyse the characteristics of the protection of human rights and freedoms explicitly mentioned in the Convention. The complexity of the study of the Court's practice for the protection of unrecognized human rights and freedoms stems from its heterogeneity. However, an analysis of the practice of protecting such rights and freedoms reveals the internal mechanisms of the Court to ensure the equilibrium of legal space. The article defines the basic position of the Court on the question of determining the degree of proportionate balance between public and private interests in establishing restrictions on the rights and freedoms of a person and a citizen not expressly enshrined in the Convention. The realization of economic rights and freedoms requires the greatest flexibility of the mechanism for the protection of rights and freedoms. Intensive economic development requires a rapid change in the legal space. The interpretation of human rights and freedoms has an impact on the level of protection of the economic rights and freedoms. The text of the Convention has been modified without adopting its new edition.

Conclusions. Law enforcers are particularly interested in analyzing the Court's practice in cases related indirectly to the protection of freedom to conduct a business. The Court determines the main vectors of interpretation of the freedom to conduct a business. Law enforcers can use the Court's approach in interpreting the provisions of the Convention without risking being accused of human rights and freedoms violations. The generalizations make it possible to establish the ideological and substantive component of the basic axiological imperative of the Court in the protection of the economic rights and freedoms through the protection of the right to property. It was concluded that the Court's decisions justified the need to protect the freedom to conduct a business by its inherent connection with the right to property, as well as the universality of the criteria for determining the legality of restricting the rights and freedoms.

1. Introduction

Shaping the legal ideology of the Global North [1, p. 224-281] was largely due to the development of a common European policy aimed at a unified understanding of fundamental rights and freedoms and common practice in the interpretation of relevant legal norms. The provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (the ECHR, the Convention) define the scope of protected rights and freedoms, but the European Court of Human Rights (the ECtHR, the Court) in its work broadly interprets the list of rights protected in the ECHR. In addition, it should be borne in mind that law enforcement officers of different countries and supranational entities may establish criteria for determining the legality of a restriction of rights, since rights are inherent in the rights of other actors, the interests of the State and society as a whole. In the case of the ECHR, the system of eligibility criteria established and confirmed in the Court's practice is limited. The present study attempts to establish the basic position of the Court on the question of determining the degree of proportionate balance between public and private interests in establishing restrictions on the rights and freedoms of a person not expressly enshrined in the Convention. The study of the practice of the ECHR in cases of protection of the freedom to conduct a business is of particular interest. The conclusions reached will make it possible to establish a link between the protection of the freedom to conduct a business and the protection of the right to property.

The current practice of the ECtHR to broaden the interpretation of the provisions of the ECHR does not mean that the Court exceeds its powers. This practice reflects the idea of circular causality of legal phenomena perceived in European space. This approach not only changes the quantitative parameters of the legal system, but also develops the qualities of the practical implementation of the principles of the ECHR through ensuring the realization of fundamental human rights and freedoms.

The issues of determining the limits of possible restrictions on rights and freedoms have

been deeply studied in the works as domestic [2; 3; 4; 5], as well as foreign authors [6; 7]. In foreign legal science, the term interference is used, in Russian - restriction. Despite the use of different terminology in the process of knowledge, the approaches have a common basic imperative. The imperative is based on the notion that there is a "boundary of opportunity" in the realization of human rights and a "boundary" of the permissible restriction of rights by the state. This approach is due to the absence of a different mechanism for maintaining a balanced constitutional order in the exercise of rights and freedoms [8, p. 27].

Most often, researchers consider the activities of the ECtHR to protect the rights and freedoms clearly enshrined in the ECHR as an object [9; 10; 11; 12], less often - rights and freedoms with inherent connection to the right or freedom enshrined in the Convention, and therefore also receiving legal protection in the ECtHR [13; 14; 15]. However, traditional approaches do not meet the challenges of time. In order to ensure that the business community clearly understands its "boundaries" in doing business, ECtHR practices play a crucial role. For Russia, the experience of the ECtHR in developing unified rules for restricting entrepreneurial activity may be in demand. The active work of the Constitutional Court of the Russian Federation on balancing the economic space by legal means, as well as the formation and implementation of state economic policy, require an understanding of the positions of the ECtHR.

2. Concept of restriction of human and civil rights and freedoms: basic categories

Rights and freedoms have an inherent connection with the restriction of rights, constitutional obligations. The distinction between similar categories of "limitation," "limits," "interference," "derogation," "denial," "abolition," "deprivation" of human rights has no unequivocal solution [16].

Of all the terminological disputes, it is important to distinguish between the categories of "restriction" and "intervention," as well as the restrictions and inherent (natural) limits of rights.

The current model for restricting human rights and freedoms [17, 18] is based on an

understanding of the possibility of restricting human rights. Limitations of rights are related to the "objective need of society and the state" [19; p. 144], with the individual having "boundaries" of behavioral capabilities [20, p. 433].

The Russian Constitution operates with the phrase "restriction of the right." In contrast, in Germany, many other countries of the Council of Europe, the concept of "interference" of the state in human rights is developed. The level of restriction of rights is assessed as an invasion of the state into the legal status of the individual. Such a restriction is perceived negatively if the necessary conditions are not met. Therefore, in addition to restricting the right as a lawful act on the part of the State, "interference" is also possible [21]. If the limitation of the right (*Schranken*) is considered as establishing the limits of the use of rights and freedoms [22, p. 76] (for example, limiting the secrecy of correspondence, postal, telegraph and telephone communications (para. 1 part 2 of the Basic Law of the Federal Republic of Germany, then intervention (*Eingriff*) is an invasion, negative state change or influence on it [23, p. 186]. For example, restriction of the right to life (paragraph 3 of part 2 of article 2 of the Basic Law of the Federal Republic of Germany). The inadmissible actions are infringement (*Benachteiligen*) ("denial of preference (discrimination) or, on the contrary, the granting of privileges" [24, p. 34] (paragraph 1 of part 3 of article 3 of the Basic Law of Germany)), obstacle (*Behindern*) (prevention of the situation, interference with its implementation [22, p. 76] (for example, paragraph 2, part 3 of Art. 9 of the Basic Law of Germany does not allow the creation of obstacles to the exercise of the right to unification, freedom of strike struggle)) and violation (*Verletzung*) (a crime of the obligation to comply with established rules of conduct [22, p. 73] (for example, paragraph 2, part 1 of Art. 2 of the Basic Law of Germany establishes the inadmissibility of violation of individual freedom)). For freedom to conduct a business, the term "intervention" is more commonly used. When restricting this right, the limits of the use of the right are not simply established (the limits cannot be established, since entrepreneurial activity is

multifaceted, only if we talk about inherent limits), but there is a lawful invasion of the activities of business entities. At the same time, the use of the term "restriction" has an established tradition of application in Russian legal science.

Proponents of the distinction between limitations of human rights and inherent limits of law [25; 26; 27; 28; 29] see in their legal nature and peculiarities of manifestation in the legal space. For example, B. S. Ebzeev distinguishes these concepts by establishing differences between the categories of "constitutional restriction" and "restriction of fundamental rights." The category of "constitutional restrictions" includes, in addition to the restrictions on fundamental rights and freedoms, also the inherent limits of fundamental rights, which are enshrined in the Constitution itself and do not constitute a restriction of fundamental rights, but the determination of their boundaries, normative content and scope of powers [see 30]. "The restriction of fundamental rights may occur at the level of federal laws within the framework permitted by the Constitution and concerns rights not enshrined in the Constitution" [27, p. 62].

Freedom to conduct a business is a clear example of a right that fits the theory of inherent limits of rights. Its application allows us to determine the cause and possible options for the restrictive influence of the state in the process of its implementation. The right under consideration relates to the observance of the rights and freedoms of other participants in economic relations. There are limitations on this right, both on the part of legislation and fairness.

The idea of limiting entrepreneurial activity also has a more traditional understanding in legal science. For Russian science and practice, including the Constitutional Court of the Russian Federation, freedom to conduct a business of entrepreneurial activity is possible only within the framework of prohibitions and restrictions established by the state. There are many restrictions, since "unlimited freedom of some can turn into arbitrariness towards other participants in civil traffic" [31, p. 16] (which is fully consistent with the concept of "regulated entrepreneurship" [32, p. 383, 385]).

3. Criteria established by the European Court of Human Rights for determining the

lawfulness of the restriction of human rights and freedoms

The Council of Europe pays great attention to giving the complex question of determining the "boundaries" of the permissible restriction of human rights and freedoms the signs of uniformly interpreted legal phenomena.

Article 8-11 of the ECHR states that public authorities may restrict the rights of individuals in the interests of national security and public order. Part 1 of Art. 1 of Protocol No. 1 establishes that "no one may be deprived of his property (possessions) except in the interests of society and on the conditions provided for by law and general principles of international law"¹. These acts allow the seizure of property in public interest, sometimes interpreted by the authorities very widely due to the so-called doctrine of margin of appreciation. In Russia, this concept is translated as freedom of discretion [33, p. 149].

The ECtHR clearly denotes the criteria for the legality of restrictions (intervention):

- provided by law (the contested measure must be based on national legislation, the law must be "accessible to the person concerned"²;
- legal "predictability" as a qualitative characteristic of the national law³ (legislation "must be sufficiently clear in its wording"⁴ to "avoid any risk of arbitrariness and allow the a person if necessary to foresee legal consequences"⁵);
- respect for the rule of law ("national legislation must provide adequate protection

against arbitrary interference with rights"⁶ and "any abuse or arbitrariness"⁷, including "in adversarial proceedings"⁸);

▪ necessity (proportionality) (intervention is necessitated by an urgent need and is proportional to a legitimate goal, it is "necessary in a democratic society to achieve"⁹ legitimate goals, the state "exercised its discretion in good faith, carefully and reasonably"¹⁰, therefore, the freedom of discretion of the state "is not unlimited"¹¹. This criterion means that there must be a fair balance between the requirements for the protection of the interests of society and those for the protection of fundamental human rights¹².

These criteria are universal and can be supplemented if necessary.

4. Acts of the European Court of Human Rights in defining the range of permissible restrictions on the freedom to conduct a business

The economic rights and freedoms enshrined in the ECHR are limited by the State's broad economic sovereignty. In the process of interpreting the ECHR, the practice of the exercise of civil and political rights may have consequences of a "social orientation," since "there is no hard border between this sphere and the content of the Convention" [34, p. 90]. When a person carries out entrepreneurial activities in the sphere of economic relations, the consumer of goods is also involved,

¹ Protocol N 1 to the Convention for the Protection of human rights and fundamental freedoms, as amended by protocol N 11 (Paris, 20.III.1952). URL: <https://echr.coe.int/>

² Uzun v. Germany (Application no. 35623/05, 2 September 2010). URL: <https://hudoc.echr.coe.int/rus?i=001-100293>.

³ Ternovszky v. Hungary (Application no. 67545/09, 14 December 2010). URL: <https://hudoc.echr.coe.int/rus?i=001-102254>.

⁴ Uzun v. Germany (Application no. 35623/05, 2 September 2010). URL: <https://hudoc.echr.coe.int/rus?i=001-100293>.

⁵ Medvedyev and others v. France (Application no. 3394/03, 29 March 2010). URL: <https://hudoc.echr.coe.int/rus?i=001-97979>.

⁶ Uzun v. Germany (Application no. 35623/05, 2 September 2010). URL: <https://hudoc.echr.coe.int/rus?i=001-100293>.

⁷ Robathin v. Austria (Application no. 30457/06, 3 July 2012). URL: <https://hudoc.echr.coe.int/rus?i=001-111890>.

⁸ Capital Bank AD v. Bulgaria (Application no. 49429/99, 24 November 2005). URL: <https://hudoc.echr.coe.int/rus?i=001-71299>.

⁹ Sérvulo & Associados - Sociedade de Advogados, RL and others v. Portugal (Application no. 27013/10, 3 September 2015). URL: <https://hudoc.echr.coe.int/rus?i=001-157284>.

¹⁰ Szabó and Vissy v. Hungary (Application no. 37138/14, 12 January 2016). URL: <https://hudoc.echr.coe.int/rus?i=001-160020>.

¹¹ Cumhuriyet Halk Partisi v. Turkey (Application no. 19920/13, 26 April 2016). URL: <https://hudoc.echr.coe.int/rus?i=001-162211>.

¹² Sporrang and Lönnroth v. Sweden (Application no. 7151/75; 7152/75, 23 September 1982). URL: <https://hudoc.echr.coe.int/rus?i=001-57580>.

who also has rights, therefore, in the legal relationship that arose, both entities have both rights and obligations. In this case, the position of the ECtHR is fully applicable, according to which interference is prohibited, which violates the fair balance between the need to protect general interests and the right to property¹³. For the Court, the concept of "property" is not limited to the possession of tangible goods and does not depend on formal classification in national law. For this reason, freedom to conduct a business is thus subject to article 1 of Protocol No. 1¹⁴.

Thus, despite the fact that the Convention does not establish freedom to conduct a business, the ECtHR protects this freedom through the protection of right to property. It should be assumed that the ECtHR "in its practice made a number of revolutionary decisions, developing the Convention as a" living instrument, "with the aim of adapting it to changing conditions. The "living instrument" is combined with the granting of freedom of action to member states of the Council of Europe, the volume of which depends on a specific subject area "[35, p. 3]. The ECHR's interpretation of the Convention with regard to economic rights is a manifestation of the "gradual formation of the evolutionary approach of the Court to the interpretation of the provisions of the Convention." As a result of such activities, "the text of the Convention was modified without adopting a new version" [36, p. 77].

The ECtHR has repeatedly emphasized that States should ensure the effective realization of rights, including those arising in the field of business. "Under such circumstances, a State cannot simply take a passive position"¹⁵. The requirement to ensure legality implies the existence of legally established legal remedies.

Legal protection is important, since "any interference with the right to respect for property must be accompanied by procedural guarantees"¹⁶, which give an individual or legal entity the opportunity to submit a case to the competent authorities in order to challenge the interference measure. The ECtHR recognizes the wide discretion of states in determining the public interest, since national legislatures have wide powers to implement social and economic policies¹⁷.

For example, in *Sovtransavto-Lugansk-Holding Company*, the ECtHR expressed the position that the applicant's right to respect for its property was violated by a lengthy trial characterized by the intervention of an executive authority. The resulting uncertainty constituted a violation of article 1 of Protocol No. 1 of the Convention.

In *Oklešen and Pokopališko Pogrebne Storitve Leopold Oklešen S.P. v. Slovenia*¹⁸ the ECtHR admitted the absence of violations in the actions of the Slovenian authorities, which led to the cessation of individual activities. The Court found that, throughout the period during which the entrepreneur carried out his activities, he was aware of its temporary nature, therefore, the State provided the applicant with the necessary information in a timely and consistent manner, that is, it implemented the rule of legal predictability of the restriction.

According to the ECHR, the state, establishing additional requirements for entrepreneurial activities within the framework of the licensing and permitting system, is responsible for the effectiveness of the system. For example, the ECHR recognized the legality of claims by shipowners for damages caused by an accident arising from improper pilot escort of naval vessels. This escort was a public service organized by the state in the interests of navigation, therefore, the

¹³ *Anheuser-Busch INC. v. Portugal* (Application no. 73049/01, 11 January 2007). URL: <https://hudoc.echr.coe.int/rus?i=001-78981>.

¹⁴ *Oklešen and Pokopališko Pogrebne Storitve Leopold Oklešen S.P. v. Slovenia* (Application no. 35264/04, 30 November 2010). URL: <https://hudoc.echr.coe.int/rus?i=001-101988>.

¹⁵ *Sovtransavto Holding v. Ukraine* (Application no. 48553/99, 25 July 2002). URL: <https://hudoc.echr.coe.int/rus?i=001-60634>.

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¹⁶ *Capital Bank AD v. Bulgaria* (Application no. 49429/99, 24 November 2005). URL: <https://hudoc.echr.coe.int/rus?i=001-71299>.

¹⁷ *Intersplav v. Ukraine* (Application no. 803/02, 9 January 2007). URL: <https://hudoc.echr.coe.int/rus?i=001-78872>.

¹⁸ *Oklešen and Pokopališko Pogrebne Storitve Leopold Oklešen S.P. v. Slovenia* (Application no. 35264/04, 30 November 2010). URL: <https://hudoc.echr.coe.int/rus?i=001-101988>.

state had to ensure the effective operation of the created system¹⁹.

The ECtHR protects the freedom to conduct a business through ownership even in a situation where the emergence of a right in a business entity is associated with the establishment of an undemocratic political regime. In 1994, the complainants appealed against the Greek Government's refusal to reimburse for the termination of the company's contract during the military regime. The court noted that the democratic Greek state needed to terminate the contract, which, according to the Greek Government, causes economic damage²⁰. However, the Court considered inadmissible a situation in which certain substantive paragraphs of the contract were unilaterally terminated.

Thus, the Convention protects the freedom of business as well, indirectly through guarantees of ownership. Business entities may become applicants to the ECHR for violation of their rights not expressly provided for in the Convention.

5. Conclusions.

Despite the absence of provisions on freedom to conduct a business in the Convention, the ECtHR is actively involved in establishing the legality of the activities of public authorities in the field of entrepreneurship by analyzing the observance of right to property. The ECtHR in the process of considering such cases proceeds from the general theory of restrictions (interference), recognizing a violation only if the state has not met the criteria for permissible restrictions of rights. An extensive interpretation of the Convention was warranted, since business was directly linked to property and its use. The inclusion of freedom of business in the range of protected rights and freedoms allows us to conclude elements of economic space in a common space with a further integration interpretation of ongoing processes. The ECtHR does not merge ownership and freedom of business, but indicates the applicability of the

method of circular causation in the processes of development of a holistic system through the development of its individual elements. The development of the economy requires greater speed and flexibility in decision-making, problems with the implementation of the protection mechanism can lead to stagnation of economic development. The ECtHR demonstrates the commitment of the Council of Europe to stimulate economic activity based on unified practices in interpreting similar situations.

¹⁹ *Pressos Compania Naviera S.A. and Others v. Belgium* (Application no. 17849/91, 20 November 1995). URL: <https://hudoc.echr.coe.int/rus?i=001-58056>.

²⁰ *Stran Greek Refineries and Stratis Andreadis v. Greece* (Application no. 13427/87, 9 December 1994). URL: <https://hudoc.echr.coe.int/rus?i=001-55737>.

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BIBLIOGRAPHIC DESCRIPTION

Yakimova E.M. Practice of the European Court of Human Rights in defining the range of permissible restrictions on the freedom to conduct a business. *Pravoprimenenie = Law Enforcement Review*, 2022, vol. 6, no. 1, pp. 205–215. DOI: 10.52468/2542-1514.2022.6(1).205-215. (In Russ.).

