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Legal nature of decisions of European Court of Human Rights

Abstract: Human rights and democracy are the institutions of paramount importance. However, in number of countries the mentioned values are raised in absolute, used as a pretext to interfere in home affairs of separate countries. Correspondingly, all judicial institutions, which have business with human rights including the European Court, are artificially idealized, presented as some etalons of complete objectivity, honesty, impartiality, in form of the latter and final instance on the way to reach the justice.

Keywords: European Court of Human Rights; rights and freedoms of man; European Convention on Human Rights; jurisdiction; criminal procedural law; sources of law; decisional law of the Court; Supreme Court of RF.

There is no secret that despite the great significance of the European Court in protection of human rights, an assessment of its activity in general and its separate decisions by the specialists-professionals in this area are rather non-unambiguous. The reasons of this is concluded the both in widespread activity of the European Court directly connected with protection of human rights and in international and socio-political environment that surround of it.

Together with prevailing positive assessment of the activity of the European Court and adopted by it decisions, in the western legal and partly in socio-political literature take the place quite argumentative assertions on growing politicization of the Court activity. It is said about problems concerning independence and

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impartiality of the judges of the European Court, adoption of opposite decisions at the same circumstances in respect of various states and others. As O.N. Malinovski and V.S. Kubrak rightly note, all these problems undermine authority of the European Court and are negatively influenced in effectiveness of its work [17, p. 57-62].

In the context of Russia this is very visibly manifested in the cases connected with Chechnya [26, p. 1323-1336], the Trans-Dniester Moldavian Republic and others received more social resonance of the cases [26, p. 1336-1349] . In one's time, Commissioner of Russian Federation under the European Court stated: "I believe that the decision of 'Ilasku and others vs. Moldova and Russia' is one of the blackest pages of the European Court's history. I hope that this decision of the European Court will be sooner or later recognized as wrongful by the Court itself…" [24]. However, today this practice of the European Court is not rare [2, p. 5]. Naturally, these decisions have inevitably the both the political character and legal one. It would be correct these decisions should be considered not only as legal but also political and legal decisions with all the ensuing consequences.

According to M.N. Marchenko, "human rights and democracy are the institutions of paramount importance. However, in number of countries the mentioned values are raised in absolute, used as a pretext to interfere in home affairs of separate countries. Correspondingly, all judicial institutions, which have business with human rights including the European Court, are artificially idealized, presented as some etalons of complete objectivity, honesty, impartiality, in form of the latter and final instance on the way to reach the justice" [18, p. 11-19].

Point of view, according to which human rights (despite their universal nature) are in most extent particularly '' western values [9, p. 78-79] is quite often argued in home literature. It is asserted that the topic of rights and freedoms of man is actively used as leverage in international relationships' [16, p. 10-18].

According to A.I. Ovchinnikov, "classical ideal of the European legal thinking unwillingly is acted as a guide of its globalization, its most negative trends and features" [21, p. 36-41].

V.A. Kartashkin believes that "according to international documents, which have universal nature, human rights do not depend on a volition of state, and they are 'natural' and 'inalienable', belonging to everybody from the time of birth. International norms on human rights reflect common to all mankind values and therefore they are recognized by the countries, many of which did not participate in their development" [10, p. 281-327; 11, p. 2-8; 12, p. 13-18].

This testifies about presence of the polar assessments in problem of considering of a concept of rights and freedoms of man of foreign experience and norms of international law in the Russian legal system. Topicality of the problem essentially increases currently due to extension of sphere of international legal protection the rights and freedoms of man including an opportunity to address to the European Court. We consider that in this context it is necessary to take into account objectively existing contradiction between worldwide process of globalization and the needs of the states to save own identity. In this connection we should pay attention to the point of view of N.N. Moiseeva, in compliance with which "in different conditions and different times various societies found and will find a measure of compromise between freedom and equality corresponding to specific vital realities. There are no any common universal receipts, which might be used in all times and by all people" [20, p. 37-38]. E.A. Lukashova soundly points out on objective dependence of this process from such factors like 'socio-cultural systems, traditions and level of welfare of people of specific countries' [22, p. 55]. R.T. Shamson demonstrates the same approach and supposes that "whole understanding of the concept rights and freedoms of man impedes the number of other circumstances including in itself differentiations in social conditions of existence of people, changes of a content of human rights in course

of historical development, deep varieties in moral and legal views in different countries at this problem" [28, p. 65-66].

We should agree that "human rights concentrate all important social norms and principles – not only legal, but also moral, political, religion and philosophic ones, which in different epochs gave them a peculiar colour in accordance with the economic structure and culture of that or other society". It is impossible a progress of society if a man does not receive more range of rights with each new stage of development. It seems that in this case it is necessary to take into account the both objectively developing process of globalization, international integration and traditionally formed national particularities and opportunity of harmonic relation of interests of a person and state [2, p. 99-110].

A chairman of the European Court Luzius Wildhaber touching the problem of correlation of law and policy, noted that situation when case-law of the Court had come contrary to the provisions of Constitutions of countries-members of the Convention, appeared very rare. More frequently are met the cases, which might be evaluated by any agencies of power as complex and entangled. Exactly in these situations some critics begin to say about the fact that the Court is politicized or interested in the result of a case [6, p. 87-89].

Certainly, the mechanism of the European Court has defects, and sometimes it is a source of number of problems. Separate states had often expressed negative opinion to supranational jurisdiction of the Court in the context of human rights protection that mostly was connected with traditions of national systems. Regarding the European Court, we may note that it like any other international or national institution does not appear and exist itself, beyond connections and interdependences with surround of it socio-political environment including various state and interstate institutions. Accordingly, adopted by it decisions have objectively to bear the mark of these interconnections and interdependences. Despite the strained, sometimes politically and ideologically determined attention

to human rights and to the European Court, should be recognized that at considering of received in the Court cases, it is often met with absolutely real problems of human rights protection.

In our opinion, rights and freedoms of man are one of the few institutions, for which is inherent the establishment of unite standards and coordination of efforts in international level. Absence of clear, simple and understandable procedure of performance of rights and freedoms leads to the fact that a citizen remains without reliable mechanism of protection his rights and any legislative provisions turn 'only into paper declarations' [19, p. 43-44]. Therefore, determination of legal nature, content and character of the decisions of the European Court is an important in our studying. This is directly connected with resolution of an issue on a place of the decisions of the Court in mechanism of criminal procedural regulation.

At one time, attempts to qualify the decisions of the European Court were undertaken both by the general theory of law and the branch specialized legal sciences, including the science of criminal procedure law. However, the discussion has been continuing until now. It seems that the reasons of discussion connected, firstly, with declarative nature of separate norms of European Convention; secondly, at development of the European Convention is not taken into account a specificity of the Russian law, and the Russian Federation has joined to the international legal act, which has ever been existed for few decades; thirdly, until now there is no ambiguously solved in science an issue on inclusion of the case-law of the European Court into the legal system of Russia and assessment of legal significance of the decisions of the Court as admissible sources of criminal procedural law; fourthly, with unclear definition of this issue in the federal law on ratification of the Convention; fifthly, with presence of contradictions between Russian legislation and the norms of European Convention, case-laws of the Courts.

In science of criminal procedural law the problem on legal nature of the decisions of the European Court is not new one and connected, as we have already determined, with problem of the sources of criminal procedural law. In whole there are three significantly differentiated of each other approaches in legal literature. The first approach is associated with categorical denial of lawmaking function of the European Court and accordingly with denial of the precedent nature of adopted by it decisions. The second approach comes down to directly contrary conclusion of the followers of the first approach. Followers of the third approach, considering an issue on legal nature of the decisions of the European Court, note its lawmaking functions in process of formation of case-law and created by it precedents are actually recognized as the sources of law the both by all-European institutions and national courts [27, p. 37-39].

At what is concluded an essence of the decisions of the European Court, what they are: normative legal acts, court precedents, acts of prejudicial nature or legal positions either legal standards in an area of administration of justice.

Normative legal act, legal custom, judicial precedent, treaty of normative content are considered to be a common recognized sources of law in legal theory. These sources exist in all legal families, in each of which prevails one form of law. In addition, some scientists distinguish religion dogmas, legal science and principles of law [14, p. 181]. In the Russian legal system for long time a judicial precedent has not recognized as a source of law, though judicial practice played a certain role at resolution of similar cases in absence of the norm of law, and also took into account at establishing of laws.

It is known that Russian legal system includes in Roman-German legal family or in the system of continental law which is characterized with normative regulation of social relations. Even 70 years period of action, so named, socialist law and establishing of own legal system of the socialist countries were closer to the continental legal family as their legal science formed in the basis of Roma law

which recognises normative approach. The trace of this law is seen in modern legal world [23, p. 65].

Last time, there has been a tendency in domestic jurisprudence to revise the theory of sources of law. The judicial reforms being carried out in Russia encourage scientists and practitioners to search for new ideas that will increase an effectiveness of the judiciary, one of which is "legislative fixation of judicial precedent as a secondary source of law" [25, p. 32-33]. Since in legal state where 'judiciary becomes the main controlling factor, the judicial practice inevitably becomes a source of law' [7, p. 49-51].

Scientific topicality and practical significance of the precedent for legal system of Russia and criminal procedural law is confirmed by multiplicity of dissertations and other scientific works dedicated to this topic [4; 13, p. 10-15]. Despite its significance, a doctrine of judicial precedent has not yet received until now an unambiguous understanding and gaining of foothold in criminal procedural science and practice. According to number of scientists, an idea of using of judicial precedent in criminal proceedings is currently seen inconsistent; it is not clear the perspectives of an official recognition of judicial precedent as the sources of law [5, p. 8-10], and unlike it is necessary to break centuries traditions and eclectic joint of various legal systems. Wherein in the basis of their arguments the opponents of judicial precedent often lays a position about the fact that presence of opportunity to a court to make law violates the constitutional principle of separation of powers.

Nevertheless, analysis of opinions of jurisprudents-theorists and practitioners confirms factual existence of judicial precedent that created by superior judicial instances. In case of absence of the norm of law the courts is guided by decisions of the Supreme Court of RF, separate provisions of which promptly complete those that a lawmaker did not take into account. This confirms an existence of mandatory nature of application of court decisions of superior judicial instance in the Russian

legal system [8, p. 21-24]. The purpose of explanations of the Plenum of the Supreme Court of RF is not only to draw attention the courts to necessity correct interpretation of laws, but also to lay under obligation to resolve cases in exact compliance with current federal legislation, generally recognized principles and norms of international law. Namely judicial practice of the Supreme Court made significant contribution in extension of opportunities to protect the rights of citizens in criminal proceeding. The reason of necessity of judicial legal regulation is not in plane of court's ambitions that pretend to an independent lawmaking, and in defective nature, gaps of legislative base that creates obstacles to realize the rights and freedoms in a society. In this sense rule-making of court is a forced one [3, p. 128].

Among the specialists is frequently noted sufficient influence of the case-laws of the Court to judicial practice. Superior judicial instances at examination of criminal cases are actually based on provisions of precedent practice of the Court [15, p. 46-47]. Separate decisions of the Constitutional Court of RF are bright illustration of recognition of precedent nature of the decisions of the European Court and opportunity of their use in judicial practice.

The last alterations in criminal legal legislation allow speaking on appearance of precedent and use of the rules of precedent with the Russian legal technique de-facto. Amenity of precedent is obvious. Recognition of precedent de-facto requires fixation de-jury of it. This allows more operative to eliminate the gaps in normative and legal acts, to improve and strengthen judicial protection of rights and freedoms of man. M.V. Kuchin also points out on legal fixation of judicial lawmaking as necessary condition: "Situation formed in sphere of lawmaking activity of the Russian courts strongly requires necessary legislative regulation" [13, p. 14-16].

As we see, analysis of legal thought does not exclude necessity to revise in domestic doctrine the dogma on denial of precedent as a source of law and

opportunity its appearance in future, as far as development of legal system. This is also required by our international obligations and mandatory jurisdiction of the European Court. We believe that an opportunity to apply the decisions of the Court should be clearly enshrined in the Code of Criminal Procedure of Russian Federation.

References

1. Asadova N. Strasburg zasudil Moskvu: Rossiya proigrala 11 del v Evropeyiskom sude po pravam cheloveka [Strasburg judged Moscow: Russia lost 11 cases in the European Court of Human Rights]. Kommersant. 2006. 6 October.

2. Baitin M.I. O sovremennom ponimanii prava [On modern understanding of law]. Zhurnal rossiskogo prava [Journal of Russian law]. 1999. No. 1, pp. 99-100.

3. Barak A. Sudeyiskoe usmotrenie [Judicial discretion]. Moscow, 1999, 376 p.

4. Bodrov C.Yu. Sudebnyi pretsedent v sisteme istochnikov rossiyiskogo prava [Judicial precedent in a system of the sources of the Russian law]. Dis…kand. yurid. nauk [PhD in Law Dissertation]. Kazan, 2004, 208 p.

5. Boytsova V.V., Boytsova L.V. Sudebnyi pretsedent: zarubeznyi opyt i rossiyiskie perspektivy [Judicial precedent: foreign experience and the Russian perspectives]. Yurist. 1999. No. 10, pp. 100-101.

6. Wildhaber L. Otnosheniya mezdu Evropeyiskim sudom po pravam cheloveka i natsional'nymi sudebnymi organami [Relations between European Court of Human Rights and national judicial bodies]. Sravnitel'noe Konstitutsionnoe obozrenie [Comparative Constitutional review]. 2007. No. 1(58), pp. 87-89.

7. Volkov K.A. Rol' sudebnogo pretsedenta v obespechenii sudebnoyi reformy [Role of judicial precedent in ensuring of judicial reform]. Yurist. 2007. No. 5, pp. 49-51.

8. Demidov V.V. O roli i znachenii postanovleniyi Plenuma Verkhovnogo Suda RF [On role and significance of the decisions of the Supreme Court of RF].

Bulleten' Verkhovnogo Suda RF [Bulletin of the Supreme Court of RF]. 1998. No. 3, pp. 21-24.

9. Zvonareva O.S. Globalizatsiya i vzaimodeystvie tsivilizatsiyi: politiko-pravovye aspekty [Globalization and interaction of civilizations: politico-legal aspects]. Pravo i politika [Law and Policy]. 2005. No. 5, pp. 78-79.

10. Kartashkin V.A. Mezhdunarodnaya zaschita prav cheloveka i protsessy globalizatsii [International protection of human rights and processes of globalization]. Prava cheloveka i protsessy globalizatsii sovremennogo mira [Human rights and processes of globalization of modern world]. Moscow, 2005, pp. 281-327.

11. Kartashkin V.A. Gosudarstvo i lichnost' v mezhdunarodnykh otnosheniyakh [State and individual in international relationships]. Yurist-mezhdunarodnik.2004. No. 4, pp. 2-8.

12. Kartashkin V.A. Prava cheloveka: nekotorye itogi i perspektivy [Human rights: some results and perspectives]. Vlast' [Power]. 1997. No. 3, pp. 13-18.

13. Kuchin M.V. Normotvorcheskaya deyatel'nost' sudebnykh organov RF i sudebnyi pretsedent [Lawmaking activity of judicial bodies of RF and judicial precedent]. Pravo i politika [Law and Policy]. 2000. No. 5, pp. 14-17.

14. Lazarev V.V., Lipen S.V. Teoriya gosudarstva i prava: Uchebnik dlya vuzov [Theory of state and law. Textbook for Universities]. Moscow, 1998, 448 p.

15. Laptev P.A. Pretsedenty Evropeyskogo suda po pravam cheloveka i rosiyiskaya sudebnaya praktika [Precedents of the European Court of Human Rights and the Russian judicial practice]. Konstitutsionnoe pravo: Vostochnoevropeyskoe obozrenie [Constitutional law: Eastern European review]. 2002. No. 1, pp. 46-47.

16. Lukyantseva G.E. O nekotorykh tendentsiyakh razvitiya mezhdunarodnogo sotrudnichestva i mezhdunarodnogo kontrolya v oblasti prav cheloveka (teoreticheskie i prakticheskie aspekty) [On some trends of development

of international cooperation and international control in an area of human rights (theoretical and practical aspects)]. Yurist-mezhdunarodnik. 2004. No.3, pp. 10-18.

17. Malinovski O.N., Kubrak V.S. K probleme absolyutizatsii prav cheloveka i ikh ogranicheniyi v kontekste Konventsii o zaschite prav cheloveka i osnovnykh svobod 1950 g. i rossiyiskogo zakonodatel'stva [To the problem of absolutisation of human rights and their restrictions in context of the Convention on Human Rights and Fundamental Freedoms of 1950 and the Russian legislation]/ Obschestvo: politika, ekonomika, pravo [Society: policy, economics, law]. Issue no. 9, 2018, pp. 57-62.

18. Marchenko M.N. Yuridicheskaya priroda i kharakter resheniyi Evropeyskogo suda po pravam cheloveka [Legal nature and character of the decisions of the European Court of Human Rights]. Gosudarstvo i pravo [State and Law]. 2006. No. 12, pp. 11-19.

19. Mironov O. Prava ne tol'ko dayut ili berut – ikh yesche zaschischayut [Rights not only give or take – they are ever protected]. Zakon [Law]. 2002. No. 11, pp. 43-44.

20. Moiseev N.N. Prava cheloveka v Rossii: deklaratsii, normy i zhizn'[Human rights in Russia: declarations, norms and life]. Gosudarstvo i pravo [State and Law]. 2000. No. 3, pp. 37-38.

21. Ovchinnikov A.I. Globalizatsiya i ideya universal'nogo pravoporyadka v sovremennom yuridicheskom myshlenii [Globalization and idea of universal law and order in modern legal thought]. Pravovaya politika i pravovaya zhizn' [Legal policy and legal life]. 2004. No. 2, pp. 36-41.

22. Prava cheloveka i protsessy globalizatsii sovremennogo mira [Human rights and processes of globalization of modern world]. Pod red. E.A. Lukashevoyi [Ed. by E.A. Lukasheva]. Moscow, 2007, 464 p.

23. Rene David, Camille Jauffret-Spinosi. Pravovye sistemy sovremennosti [Main legal systems of modernity]. Perevod s fr. V.A. Tumanova [Transl. by V.A. Tumanov]. Moscow, 1999, 456 p.

24. Rossiyiskaya gazeta ot 06 aprelya 2005 g. [Russian newspaper of 6 April 2005].

25. Savelyeva O.A. Zakonodatel'noe zakreplenie sudebnogo pretsedenta v Rossiyiskoyi Federatsii – illiyuziya ili real'nost' [Legislative fixation of judicial precedent in the Russian Federation – illusion or reality]. Rossiyskyi sud'ya [Russian Judge]. 2005. No. 8, pp. 32-33.

26. Sudebnaya praktika po ugolovnym delam Konstitutsionnogo suda RF, Verkhovnogo suda RF i Evropeyskogo suda po pravam cheloveka (1996-2004) [Judicial practice of Constitutional Court of RF, Supreme Court of RF and European Court of Human Rights (1996-2004)]. Sost. E.N. Trikoz [Comp. by E.N. Trikoz]. Moscow, 2006, 1408 p.

27. Tarlo E.G. Pravovoyi status Evropeyskogo suda po pravam cheloveka [Legal status of European Court of Human Rights]. Sovremennoe pravo [Modern law]. Moscow, 2004. No. 4, pp. 37-39.

28. Shamson R.T. Prava cheloveka i vnutrennya kompetentsiya gosudarstva [Human rights and domestic competence of state]. Moskovsky zhurnal mezhdunarodnogo prava [Moscow Journal of International Law]. Moscow, 2003. No. 2, pp. 65-66.