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INTERPRETATION OF LEGAL NORMS ACCORDING TO THE ESTABLISHED PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract. The purpose of the scientific article is to reveal the question of the interpretation of legal norms in accordance with the established practice of the ECtHR and to find out the ratio of normativeness and rhetoric of arguments that the Supreme Court borrows from the practice of the ECtHR and endows with signs of its own legal position or an element of the motivation of the decision.

It was emphasized that one of the problems of the interpretation activity of the ECHR is different ways of its application. Since the Convention can be applied in the judicial practice of Ukraine, the Ukrainian judicial authorities also have the right to interpret it. There is a possible conflict between the interpretation of the Ukrainian courts and the interpretation of the ECtHR. In case of conflicts of interpretations, the interpretation of the ECHR should be considered a priority.

Key words: legal norm, interpretation of legal norms, dynamic interpretation, European Court of Human Rights, judicial precedent, the rule of law.

Introduction. The specificity of the European mechanism for the protection of human rights lies not only in the existence of an act that systematizes natural rights, but also in the functioning of the supervisory body for compliance with the norms of the treaty – the European Court of Human Rights (hereinafter referred to as the ECtHR). The competence of this court includes the interpretation and application of the norms of the Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention) by the convention countries (Article 33), as well as the resolution of disputes between natural persons and the convention countries (Article 34). In addition, the European Court has the right to provide advisory opinions on a wide range of issues.

In the process of considering complaints about violations of the norms of the Convention by the participating countries, the ECHR solves the task of interpreting the norms of the Convention, ensuring that they have the same character. Interpretation, which is one of the stages of the implementation of law, occupies an important place in the functioning of law, because with the help of interpretation, the meaning of a certain rule of law is realized and explained, which is necessary for a unified understanding of the law. Interpretation has meaning and fulfills a prescribed role in the system of categories that express the peculiarities of the process of law.

The issue of the relationship between the interpretation of legal norms and the established practice of the ECtHR requires detailed research, because it is related to such a type of legal activity as law enforcement. Scientific interest in the systematic interpretation of norms, which is a means of resolving hierarchical, substantive and chronological conflicts of law, is connected with the need to increase the effectiveness of legal interpretation activities and its impact on legal practice.

It should be noted that both domestic and foreign researchers were involved in the development of questions about the relationship between the interpretation of legal norms and the practice of the ECtHR, in particular: Ya. Belykh, Yu. Bomhoff, M. Buromenskyi, O. Haydulin, V. Goncharov, I. Kaminska, K. Lenarts, V. Lutkovska, A. Mowbray, A. Monayenko, I. Onyshchuk, P. Rabinovych, O. Serdyuk, S. Syrotenko, O. Smirnova, M. Smush-Kulesha, A. Fedorova, T. Fuley, V. Khudoley, I. Sharkova and others.

However, it is not necessary to talk about an in-depth, detailed and comprehensive consideration of the question of the interpretation of legal norms in accordance with the established practice of the ECtHR in these studies. A significant number of theoretical and practical aspects of the interpretation of legal norms require scientific understanding.

The purpose of the article is to reveal the question of the interpretation of legal norms in accordance with the established practice of the ECtHR and to find out the ratio of normativeness and rhetorical arguments, which the Supreme Court borrows from the practice of the ECtHR and endows with signs of its own legal position or element of decision motivation.

Research materials and methods. A number of research methods were used in order to rethink the question of the interpretation of legal norms in accordance with the established practice of the ECtHR. In particular, the method of legal science was used as a system of means of learning law, which consists of the following subsystems: philosophical means; general scientific means; special legal means; research methods and techniques. With the help of a scientific approach, such research qualities as objectivity and evidence are ensured.

The methods and tools of the legal writing technique are applied, thanks to which the array of positive law loses its spontaneous character and becomes an expression of a certain preconceived structure subordinate to the logic of the internal structure. Thanks to the comprehensive (comprehensive) approach, there is a logical systematization of legal norms, which is carried out by the joint efforts of doctrine and judicial practice.

An important group of methods of knowledge of the interpretation of legal norms have become: general (philosophical) methods, which are the corresponding categories and models, which are characterized by general applicability not only in all branches of scientific knowledge, but also at all stages, stages of scientific research.

To clarify the content of certain scientific concepts of understanding the interpretation of legal norms in accordance with the established practice of the ECtHR, the formal-logical method was applied as a set of means and methods of logical study of law. It is based on concepts, categories, rules and laws of formal logic.

Results and discussion. The benchmark in the integration of European states is the Council of Europe – an organization whose purpose is the organization and development of a united Europe. At the same time, there are still certain questions regarding the understanding of the legal status of the practice of the ECtHR in the domestic legal system, and there are different approaches to the application of one or another decision of the ECtHR. So, on the one hand, there is a legal position that since in accordance with Part 1 of Art. 46 Conventions are high. The Contracting Parties have undertaken to comply with the final decisions of the Court in any cases in which they are parties, only decisions in which Ukraine was a party to the proceedings are precedential in nature. On the other hand, there is a legal position that all ECtHR decisions are a source of law (Monajenko & Smyrnova, 2020).

The practice of the Supreme Court provides numerous examples of such normative application. For example, the situation with the use of the classic for modern international human rights law «three-pronged test for assessing interference or restriction of the right» (legality, legitimacy of the goal, necessity in a democratic society) is indicative. Such tests are used quite often, and this is an important sign of their organic application, and not just citation. The situation is more complicated when the Supreme Court uses tests, approaches or algorithms, the source of which is the ECtHR's interpretation of more general provisions of the Convention. An example is the instrumental doctrine of «right of access to court/right to trial» created by the ECtHR, as a right that does not formally belong to the catalog of conventional rights, but is «derivative» of the right to a fair trial (Article 6) and is applied as a fundamental principle when solving a number of procedural issues. The problem of assessing the legality of the restriction of this right has repeatedly been the subject of consideration

by the Supreme Court of Ukraine (Gromads'ka organization «Instytut prykladnyh humanitarnyh doslidzhen», 2019: 16).

Recognizing the practice of the ECtHR as a source of law in court proceedings involves determining the degree of «universality of this source of law», that is, the limits of its application. Recent years have been marked by a sharp increase in the quantitative indicators of the application of the practice of the ECHR by national courts, which requires assessment and response, because there are objective limits to its application, which are established by the legal nature of the Convention and specific jurisdictional limitations (subject, subject, etc.). In this context, it is worth paying attention to the position, which, with varying degrees of consistency, is followed by numerous Supreme Court judges and which in some cases finds expression even directly in the text of decisions: «43. Therefore, in connection with the ratification of the Convention, the protocols to it and the adoption in the implementation of judicial proceedings of cases referred to their subordination, court decisions and resolutions of the Court should be applied in any case that was in its proceedings» (fragment of the Resolution of the Supreme Court of the Supreme Court of Ukraine No. 924/1389/13 dated July 19, 2018). Such a position, when it is consolidated as an element of the judge's professional culture, becomes an «internal incentive» to include the provisions of the ECtHR's practice in any own decision. This indicates the need for the formation within the national doctrine of the application of the practice of the ECHR clear and understandable criteria or procedural filters for determining the possibilities and limitations of the application of the practice of the ECHR. After all, the requirement to evaluate the legal situations of the trial according to the criteria of compliance with human rights cannot be equated with the obligation to reflect this in the text of the decision (Gromads'ka organization «Instytut prykladnyh humanitarnyh doslidzhen», 2019: 18).

According to the practice of the ECtHR, the following requirements are put forward to the «quality» of the law: accessibility; predictability; it is sufficient to clearly establish the limits of discretionary powers granted to authorities and the manner of their implementation. If the ECtHR concludes that the national legislation did not meet the requirements of the quality of the law, i.e. that the interference was not «prescribed by law», it finds a violation without resorting to analysis of other criteria, such as the conformity of the interference with a legitimate aim or its necessity, as it was, e.g., in the case «Vyrentsov v. Ukraine» dated April 11, 2013, application No. 20372/11: «The Court reiterates that the expression «established by law» in Article 11 of the Convention requires not only that the challenged measure have a certain basis in national legislation; it also refers to the quality of the law in question. The law must be accessible to the persons concerned and formulated with sufficient precision to enable them to regulate their conduct, to be able – if necessary, with due consultation – to foresee, so far as it is reasonable in the circumstances, the consequences which may entail their action (see, for example, the decision in the cases «Sunday Times v. the United Kingdom (no. 1)» (Sunday Times v. the United Kingdom) (no. 1), dated April 26, 1979, para. 49, Series A, No. 30; Rekvényi v. Hungary [GC], Application No. 25390/94, § 34, ECHR 1999-III; Rotaru v. Romania [GC], Application No. 28341/95, § 55, ECHR 2000-V; and Maestri v. Italy [GC], Application No. 39748/98, § 30, ECHR 2004-I)» (Fulej, 2015: 75–76).

In the work of the ECtHR, interpretation means clarifying the exact meaning of a rule of law. Acts of interpretation of the ECHR are designed for repeated application and use by an unlimited number of persons. Having interpreted the norm of the Convention once, the court has the right to use this model in its subsequent decisions. Having interpreted a rule of law, the ECtHR creates a so-called precedent of interpretation.

P. Rabinovych noted that the true meaning of many norms of the Convention, mostly formulated in an overly abstract, often evaluative form, is constituted and clarified only after their interpretation and application in the decisions of the Court. The practice of the Court (these are hundreds of decisions) develops according to the frankly precedential principle. And therefore, knowledge and consideration

of precedent decisions of the ECtHR, assimilation of the specifics of its professional thinking, its «legal mentality» are one of the most urgent tasks facing judges and any other subjects of human rights protection in Ukraine today» (Rabinovych, 1999).

Precedent law is a legal system in which the main source of law is recognized as judicial precedent, that is, a decision made in any case is binding on all courts of equal and lower instance when they consider similar cases. This system enables the court to perform a law-making function not only in the absence of a corresponding law, but also in the presence of an insufficiently clear norm. Case law is specific to Great Britain (more precisely, to England, since Scotland has a special law), the United States, EU member states, and other countries that have adopted English law.

The leading place in the interpretation system of the Convention is occupied by the following general legal principles of interpretation, which are usually formulated as the principles of reasonableness, justice and good faith, which in the practice of law enforcement are often interpreted as the only general principle of natural law – *bona fides* or good faith. In fact, reasonableness and equity, if they are mentioned together with good faith, act as the main criteria. Therefore, the principle of justice, verbalized using the English term equity, in contrast to justice, has mostly not a qualitative, but a quantitative character and is actually a criterion of equivalence used to qualify facts of good faith or bad faith. If the principle (criterion) of justice is most involved in the process of law enforcement, then the principle (criterion) of reasonableness is the leading one directly in the process of interpreting legal norms (Gajdulin, Hudolej, & Sharkova, 2018: 52).

The concept of proportionality in the case law of the ECtHR was applied for the first time in the decision of the Court in the case «National Trade Union of the Police of Belgium v. Belgium». The content of the mentioned concept is a proportional relationship between the applied measures and the goal they pursue (National Union of Belgian Police v. Belgium 27.10.1975).

Such principles as adherence to precedent and dynamic interpretation concretize the principle of reasonableness, adapting to case law. In practice, in its interpretative activity, the ECtHR applies the model of persuasive precedent. This means that the Court must follow its own precedents regularly, but not inevitably (Mowbray, 2009: 181–182).

In fact, in every subsequent case, the ECtHR strictly adheres to the previous interpretation, unless there is a good reason to ignore the precedent.

At this stage, the number of abrogating (cancellation) decisions is increasing in the practice of the ECtHR. The court resorts to the reinterpretation of previous interpretive versions, which is a manifestation of the tendency towards a predominantly dynamic interpretation of the norms of the ECHR Convention (Honcharov, 2013: 177).

Among the interpretive technologies used in practice by the Strasbourg Court, two juridical and technical rules are of great importance. The first rule was called *mutatis mutandis*. In Latin, this phrase means – with the replacement of what is subject to replacement; taking into account the relevant differences; with changes resulting from circumstances; with appropriate changes. The content of this prescription is that when interpreting a specific case, attention should be paid to the differences between the real situation being analyzed and the situation described in the relevant decision of the European Court of Human Rights. The second rule is called implied powers. Its essence is that the decisions of the ECtHR, although they mainly contain interpretive norms, but they are not purely declarative and have real legal force. This bindingness of decisions is based on «expectations of powers applied» (Gajdulin, Hudolej & Sharkova, 2018: 63).

As it seems, in the practice of the ECtHR, the dominant type of interpretation is an expansive one. A restrictive interpretation contradicts the essence of this agreement (Convention). Today, the ECtHR interprets the norms of the Convention as broadly as possible. When interpreting the convention, it is not considered as a list of «fixed» norms, but as a document appropriate for the time, which needs to be developed and interpreted within the limits of modern realities. This method of interpretation is

called evolutionary. It is important to note that the evolutionary interpretation is not a limitless interpretation, it must have limits, the interpretation of the norms of the Convention must correspond to the ideals and constitutional values.

The US Supreme Court, for example, has never limited itself to interpretive activity in the narrow sense. In the process of interpreting constitutional norms and principles, the activity of judges is aimed at implementing the law-making function, which is based on ensuring the stability of the American state and preserving the basic values of legal ideology, primarily the priority of fundamental rights and freedoms. Judicial activism and constitutional lawmaking allow the Supreme Court to look for ways to compromise in US constitutional law, to ease social tensions. Judges often manage to more subtly grasp the specifics of a specific situation and find the optimal means of mitigating acute conflicts faster than the legislators of the time

The very idea of the balance of constitutional values in relation to the judicial sphere goes back to the German school of *Interessenjurisdenz* and the American school of realism of the first decades of the 20th century. Balancing was perceived as a tool for settling conflicts of social interests and formulating legal norms. At the same time, as noted by J. Bomhoff, these schools developed various aspects of it, but in general sought a practical goal – ensuring the peaceful coexistence of the interests of various groups and communities as a condition for democracy (Bomhoff, 2013: 72–137).

The Analytical Report based on the results of the monitoring of judicial decisions regarding the application in Ukraine of the provisions of the Convention and the practice of the European Court of Human Rights states that during the analysis of the texts of the decisions of Ukrainian judges, an important task was to determine the prevalence of the main methods of «textualization» of the use of the ECHR and the practice of the ECHR. For the national legal tradition, the use of this source of law remains difficult not only in substance, but also from the point of view of textual design. The given data indicate the existence of two main ways/formats of reference to the ECHR and the practice of the ECHR: 1) reference to a specific decision/several decisions with an explanation of the significance for the justification of the Ukrainian judge's decision (such a format was found in 46.8% of decisions); 2) 13.4% of decisions in the motivational part contain a statement of the legal positions of the ECtHR, although there is no indication of their source (the name of the decision) (for example, the legal positions of the ECtHR regarding Article 8 and Article 10 of the ECHR are often applied in this way; 3) reference to a specific article/articles of the ECHR and an explanation of the meaning for a specific case (46.5%); 4) a significant part of the decisions in the format of reference to the ECHR and the practice of the ECHR have probable risks of improper application of the ECHR, in particular the application of «formal» or «declarative» (almost 10% of decisions are limited to only a general mention of the ECHR in the list of legal sources for consideration of the case; 20.2 % of the decisions contain only an indication of the article of the ECHR without explaining its significance for the consideration of the case (Buromenskij & Serdjuk, 2018: 16).

First of all, situations of «erroneous» and «manipulative» application of the ECHR and the practice of the ECHR are important. In the case of a «mistake», the judge incorrectly applies the rules of the ECHR or the practice of the ECHR. The following signs may indicate the «wrongness» of the application: going beyond the legal position of the ECtHR, in particular its extended interpretation of errors related to the standard criteria for the admissibility of statements used by the ECtHR; most often, this is a matter of substantive jurisdiction (ie, application to relations not regulated by convention norms), as well as a misinterpretation of the acceptable subject composition of the participants (for example, application to a dispute between state bodies); erroneous interpretation or reproduction of the content of the norms of the ECHR and the legal positions of the ECHR; presence of factually different circumstances of the case than the situation on the basis of which the ECtHR formulates certain legal positions.

The essence of «manipulative» application of the ECHR does not necessarily mean the adoption of an illegal or dubious decision (for example, with corruption implications). «Manipulative» in this report is the practice of using positions and/or the text of the ECtHR decision in a way that does not correspond to its content and the circumstances of the case, but to the «needs of the judge» regarding the justification of his own decision or its «proper declaration».

K. Lennarts, President of the EU Court, noted that the interpretation of legal norms forms the basis of the EU Court's duty to uphold the rule of law and ensure the main goals of the legal order. The interpretation of legal norms draws a horizontal line between EU institutions and a vertical line between EU institutions and the governments of member states. Judicial control is also carried out, which creates the danger of involving judges in the political process, the connection between constitutional interpretation and the application of foreign and international sources of law is outlined (Lennarts, 2007).

We agree with I. Onyshchuk that the requirement of legal certainty as a constituent element of the «rule of law» concerns the quality of legal acts and their prescriptions, not the «situation». The requirements regarding the quality of legal acts and their prescriptions are put forward with the aim of ensuring, in particular, their unambiguity. One of the components of the widely recognized and laid down basis of the practice of the ECtHR is the principle of the rule of law (the rule of law), which is basic in the understanding rule of law (Onyshchuk, 2021: 62–63).

In addition, as noted by I. Kaminska, the Court of Justice of the EU interprets the norms of EU law not only for the purpose of revealing the content of the norm, but also for the purpose of expressing its content in the context of the EU legal order. An important task of the Court of Justice of the EU is to fill gaps in the legislation, the presence of which violates the system of EU law (Kaminska, 2021: 56).

According to the analysis of the standards of the Council of Europe and the practice of the Constitutional and Supreme Courts of Ukraine regarding the limitation of social security, the right to various social benefits form parts of various human social rights guaranteed by both the European Social Charter and the European Convention on Human Rights. According to the Charter, the broader and general rules establishing social security and pension benefits are enshrined in Articles 12 and 23. According to the Convention, the European Court of Human Rights (ECtHR) regularly reviews the issue of pension and social benefits due to the recognition of their pecuniary nature under Article 1 of Protocol No. 1 establishing the right to property protection. As a rule, the level of human rights protection in the member states of the Council of Europe should not deteriorate; after granting the rights, they must remain inviolable. On the contrary, some provisions directly oblige states to increase the level of protection of certain social rights, for example, paragraph 3 of Article 12 of the European Social Charter, which establishes the right to social security, requires countries to gradually raise the social security system to a higher level (Smush-Kulesha, Fedorova, 2021: 55).

However, both the Charter and the Convention are living instruments, so the rights and freedoms set forth in them must be interpreted in the light of current conditions and relevant international documents, as well as in the light of new problems and situations arising in the world. In addition, both of these documents contain provisions that directly allow the limitation of the rights guaranteed in them; in the Charter it is Article G, and in the Convention it is Article 1 of Protocol No. 1. Thus, it should be noted that the reduction of social benefits established by national legislation is not automatically a violation of the Charter and the Convention and may be consistent with these documents, if such a reduction complies with the principles established in the precedent practice of the European Committee of Social Rights and the European Court of Human Rights.

Conclusions. Thus, one of the problems of the interpretation activity of the ECtHR is different ways of applying the Convention. Since the Convention can be applied in the judicial practice of Ukraine, the Ukrainian judicial authorities also have the right to interpret it. But the ECtHR also deals with this, therefore, the interpretation of the Ukrainian courts and the interpretation of the

ECtHR may conflict. In case of conflicts of interpretations, the interpretation of the ECHR should be considered a priority.

The expediency of the interpretation of legal norms by Ukrainian judges taking into account European standards is justified by the fact that the practice of the ECtHR is a legally recognized source of law. The goal of legal interpretation activities based on the principle of the rule of law is to ensure the predictability of normative prescriptions and a consistent approach to the interpretation of legal norms.

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