MINIMUM STANDARDS FOR THE PROTECTION OF HUMAN RIGHTS UNDER THE JURISDICTION OF THE EUROPEAN COURT

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Abstract

Within the framework of this Article, an attempt was made to establish the legal notion of human rights protection standards and consider the applicability of the latter in relation to the judgments of the European Court of Human Rights. In particular, the issue was considered according to the principles underlying the conventional system of human rights protection, as well as based on the ideological particularities of the European Convention on Human Rights, and in the context of the characteristic features of the judgments of the European Court of Human Rights. In this regard:

1. The characteristic features of the international standard for the protection of human rights, typology and descriptive meaning were established, subsequently their content was revealed;
2. The following principles and doctrines underlying the conventional system for the protection of human rights were studied: the principle of subsidiarity, the principle of establishing minimum standards for the protection of human rights, the doctrine of margin of appreciation and the pan-European consensus;
3. In the context of this Article, focusing on the specificity of the European Convention on Human Rights as a document defining the minimum standards for international legal protection of human rights, the judgments of the European Court of Human Rights were considered as interpretative guidelines for the legal standards established in the European Convention.

The Article is based on a comprehensive study of the academic sources and practice of the European Court of Human Rights, as a result of which it has been established that the European Court, interpreting the conventional provisions under the jurisprudence of the European Court, reveals the scope of legal standards prescribed in the European Convention, forming new standards in practice.

Keywords and phrases: legal standards, ECtHR judgments, typology and indicative nature, minimum standards.

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Համառոտագիր

Սույն հոդվածի շրջանակներում հեղինակների կողմից փորձ է արվել սահմանել **մարդու իրավունքների պաշտպանության իրավական չափորոշիչներ** եզրույթը և դիտարկել վերջինիս կիրառելիությունը Մարդու իրավունքների եվրոպական դատարանի վճիռների նկատմամբ: Հարցը մասնավորապես, դիտարկվել է մարդու իրավունքների պաշտպանության կոնվենցիոն համակարգի հիմքում ընկած սկզբունքների, Մարդու իրավունքների եվրոպական կոնվենցիայի գաղափարաբանական առանձնահատկությունների, ինչպես նաև Մարդու իրավունքների եվրոպական դատարանի վճիռների բնութագրիչ հատկանիշների համատեքստում:

Այս առնչությամբ.

1. սահմանվել են մարդու իրավունքների պաշտպանության միջազգային չափորոշիչների բնութագրիչ հատկանիշները՝ տիպականությունը և ուղղորդող նշանակությունը, այնուհետև բացահայտվել է վերջիններիս բովանդակությունը,
2. ուսումնասիրվել են մարդու իրավունքների պաշտպանության կոնվենցիոն համակարգի հիմքում ընկած հետևյալ սկզբունքները և դոկտրինները՝ սուբսիդիարության սկզբունքը, մարդու իրավունքների պաշտպանության նվազագույն չափորոշիչների սահմանման սկզբունքը, պետության հայեցողության ազատության ու Եվրոպական միասնական փոխհամաձայնության դոկտրինները,

3. Սույն հոդվածի շրջանակներում, հետաքրքրության կենտրոնում ունենալով Մարդու իրավունքների եվրոպական կոնվենցիայի՝ որպես մարդու իրավունքնրի միջազգային-իրավական պաշտպանության նվազագույն չափանիշները սահմանող փաստաթղթի առանձնահատկությունը, Մարդու իրավունքների եվրոպական դատարանի վճիռները դիտարկվել են՝ որպես Եվրոպական կոնվենցիայով սահմանվող իրավական չափորոշիչների բովանդակությունը մասնավորեցնող մեկնաբանություններ:

Աշխատանքի հիմքում դրված է տեսաբանների մոոտեցումների ու Եվրոպական դատարանի պրակտիկայի համապարփակ ուսումնասիրությունը, ինչի արդյունքներով արձանագրվում է, որ Եվրոպական դատարանն իր դատազորության ներքո գտնվող հարցերով կոնվենցիոն դրույթները մեկնաբանելիս բացահայտում է Կոնվենցիայում ամրագրված իրավական չափորոշիչների ծավալը՝ իրավակիրառ պրակտիկայում ձևավորելով նոր չափորոշիչներ:

Բանալի բառեր և բառակապակցություններ. իրավական չափորոշիչներ, ՄԻԵԴ վճիռներ, տիպականություն և ուղենիշային բնույթ, նվազագույն չափորոշիչներ:

МИНИМАЛЬНЫЕ СТАНДАРТЫ ЗАЩИТЫ ПРАВ ЧЕЛОВЕКА В РАМКАХ ПРАВЛЕНИЯ ЕВРОПЕЙСКОГО СУДА

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Аннотация

В рамках данной статьи со стороны авторов была сделана попытка установить правовое заключение стандартов защиты прав человека и рассмотреть применимость последнего по отношению к постановлениям Европейского суда прав человека. В частности, вопрос был рассмотрен по принципам, лежащим в основе конвенционной системы защиты прав человека, по характерным признакам Европейской конвенции прав человека, а также в контексте характерных признаков о решении Европейского суда защиты прав человека.

В связи с этим:

1. установлены характерные признаки международного стандарта защиты прав человека, типология и указательное значение, а затем выявлено их содержание;
2. были рассмотрены следующие принципы и доктрины, лежащие в основе конвенционной системы защиты прав человека: принцип субсидиарности, принцип установления минимального стандарта защиты прав человека, доктрины европейского взаимосогласия и свободы на усмотрение государства;
3. в рамках данной статьи имея в центре интереса особенности Европейской конвенции прав человека как документа, определяющего минимальные стандарты защиты прав человека- решение Европейского суда были рассмотрены как конкретизированные комментарии к правовым стандартам.

В основе работы лежит всеобъемлющее исследование подходов теоретиков и практики Европейского суда прав человека, в результате чего фиксируется, что Европейский суд, комментируя конвенционные положении, находящиеся под правлением Европейского суда, раскрывает объем правовых стандартов, прописанных в Европейской конвенции, формируя в деятельной практике новые стандарты.

Ключевые слова и словосочетания: правовые стандарты, постановления ЕСПЧ, типология и указательный характер, минимальные стандарты.

Introduction

The notion of international legal standard of human rights protection is often found in constitutional doctrinal sources, human rights theory and comprehensive international human rights treaties. However, none of the international human rights treaties examined **[1]** disclose the legal content of legal standards for the protection of human rights.

Having the aim to study the minimum standards for the protection of human rights under the jurisdiction of the European court, an attempt was made firstly to establish the legal notion of human rights protection standards and secondly to consider the applicability of the latter in relation to the judgments of the European Court of Human Rights. Given the singularity of the conventional system the issue was considered according to the principles underlying the conventional system of human rights protection, as well as based on the ideological particularities of the European Convention on Human Rights, and in the context of the characteristic features of the judgments of the European Court of Human Rights.

Theoretical-methodological bases

Taking into account that the topic at issue contains both theoretical and practical components comprehensive study of the academic sources, international treaty provisions and practice of the European Court of Human Rights have served as a base for this Article.Particular, in reference to the academic research papers and books of human rights scholars S.A. Glotov, D. Matveyeva, O.I. Tiunov, G. L. Neuman, Steven Greer and others the scope of legal standards and the characteristic features of the latter were revealed. As a result of it and based on the study of European court's case-law it has been established that the European Court, interpreting the conventional provisions under the jurisprudence of the European Court, reveals the scope of legal standards prescribed in the European Convention, forming new standards in practice.

Research methodology

The research of the topic at issue has been carried out based on a number of general and comprehensive methods applicable to all fields of science, such as deduction, induction and analysis. However, legal-comparative analysis, structural-logical and other special methods have also applied in some parts of the research.

Theorists have been regularly conducting attempts to disclose the legal content of legal standards for the protection of human rights. In particular S.A. Glotov defined human rights legal standards as an international legal obligation specifying and clarifying the content of the principle of respect for human rights **[2, p. 6].** According to D. Matveyeva, "Human rights standards are legal norms having the aim to protect

universal human rights and freedoms, as well as to establish the mechanisms guaranteeing them **[3, p. 4].** Within the framework of this Article, an attempt will be made to establish the legal notion of human rights protection standards combining the ideological content of the concept of legal standard in conjunction with the above-mentioned definitions, highlighting its characteristic features.

According to Hrachya Acharyan's explanatory dictionary of the modern Armenian, “standard” means a typical example - a sample, according to which different objects are made with their own shape, quality, template **[4].** In S.I. Ozegova's explanatory dictionary, the word “standard” is defined as “a sample to which it should be matched according to its characteristics and qualities."

We do not share the above-mentioned approach concerning the fact that the legal standard is the same as the international legal obligation of the state. We consider that legal standards for the protection of human rights are the minimum requirements necessary for the full implementation of the state’s function to protect human rights while the international legal obligation of the state is to ensure the implementation of these requirements and based on them guarantee practical applicability of respective structures.

As O.I. Tiunov rightly stated the following features are characteristic of legal standards: typology and indicative nature. Typology of legal standards entails that for all states certain standard rights and obligations derive from the content of the legal standards which is aimed at ensuring the minimum necessary guarantees of legal protection in all states **[5].**

According to the approach adopted in international human rights law, derogation from the legal standard is possible only in two cases, when higher guarantees are established by domestic law or when the content of the legal standard is being more clarified **[6, p. 15].**

The next characteristic of legal standards is their indicative nature. The latter is the unique distinguishing feature by which the legal standard differs from any other legal provision **[7, p. 232].** Legal standards for the protection of human rights are crucial for the development of human rights policy by states.

The provisions of national constitutions served as the substantive-ideological basis for the European and international human rights conventions signed after the Second World War. However, in order to define the comprehensive legal content and substance of fundamental human rights, all of the above instruments, including the European Convention on Human Rights, were originally based on the concept of "minimum standards for the protection of human rights" and "subsidiarity". At the same time, the European Court of Human Rights by its case-law developed the doctrines of margin of appreciation and common pan-European consensus. Each of the above concepts, in its own legal nature, reveals the content of states' responsibility for the protection of fundamental human rights.

The content of the concept of subsidiarity derives directly from the primary obligation of the state to protect human rights within its own legal system. Thus, before

turning to the mechanisms of international legal protection of fundamental human rights, it is first and foremost the duty of every state to effectively guarantee the protection of fundamental human rights and freedoms **[8, p. 7].**

Guided by the European Court's standards, it is the national authorities' obligation to guarantee the conventional rights and to protect them at a level that is at least equal to that provided by the European Convention on Human rights. The Court has constantly stated that the national authorities are generally better placed than the European Court to make policy choices and protect fundamental rights in a way that fits well with national law and national constitutional traditions **[9].** Moreover, the European court has stressed that the principle of subsidiarity means that the national authorities should offer primary protection **[10, p.6].** This principle of primality is of great importance, as it defines the Court's own role, which is first and foremost one of supervision. Protocol No 15 to the Convention, which entered into force this year, introduces a specific paragraph to the preamble to the Convention in which both the principle of subsidiarity and that of primary responsibility of the states are emphasised.

In addition, it is important to recall that the European Court of Human Rights is a judicial body-a court and, consequently it operates under the same constitutional restrictions that are in effect for national courts. Accordingly, it has accepted that it should respect the notion of separation of powers and it should not stretch the rights and obligations under the Convention to the extent that de facto new norms are created **[11].**

Finally, the Court has constantly demonstrated its awareness of national diversity and has tried to respect deeply felt national sensitivities and national (legal, political and social) traditions. Thereby it has always accepted and stressed its subsidiary role, which is apparent from one of its earliest landmark cases- the Belgian Linguistics case of 1968:

"*The Court cannot disregard those legal and factual features which characterise the life of the society in the State which, a contracting party, has to answer for the measure in dispute. In so doing it cannot assume the role of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the requirements of the Convention"**[12].***

These considerations highlight the impact of the subsidiarity principle on the Court's argumentation methods, which has been further developed in subsequent case-law. The Court will only accept new interpretations or apply intensive scrutiny to a justification if there is sufficient consensus on a certain topic, or if the Court is at least as well placed as the national authorities to decide a case. It will also usually leave a margin of appreciation to the case, applying a deferential test that leaves sufficient leeway to the states to take their own decisions and express their own policy preferences **[13].** In our opinion the principle of subsidiarity leads the Court to apply

such methods as autonomous interpretation, procedural review and case-based decision making to minimise intrusion into national policy and domestic law. This leaves the national authorities, including the national courts, with much freedom to decide how they want to comply with Convention obligations. This freedom is limited, however, by the main objective of the Convention- to provide effective protection to fundamental rights. In its case-law, the Court may approve national authorities' way of dealing with fundamental rights issues, but it may equally be extremely critical of the remedies and guarantees offered to individuals. By formulating positive procedural obligations, the Court may encourage the states to respect the Convention, while permitting the Court itself to remain at a distance and exercise only deferential, substantive review.

According to the jurisprudence of the European Court of Human Rights, a person has the right to seek international legal protection only if all domestic remedies have been exhausted. This principle is directly related to the right to an effective remedy guaranteed by Article 13 of the European Convention, which we will discuss in more detail below.

One of the aims of the European Convention, inter alia, is to establish minimum standards for the protection of human rights **[14, pp. 15-16].** G.L. Neuman explains the concept of minimum standards for the protection of human rights in this way: international and European conventions on the protection of human rights set the minimum threshold for fundamental human rights, not the maximum **[15, p. 1885].** The approach to setting minimum standards for the protection of human rights is enshrined in almost all international human rights traties. For example, the second part of Article 5 of the International Covenant on Civil and Political Rights has the following content:

"*There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent"*.

Article 53 of the Charter of Fundamental Rights of the European Union reads as follows:

"Nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the [ECHR] and by the Member States' constitutions".

According to Article 53 of the European Convention

"Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party". The meaning of Article 53of the European Convention of Human Rights has rarely been considered by the European Court, but broadly speaking it has been read as

allowing the parties to the Convention to offer more protection to the rights protected under the Convention as long as they do not, in this way, act in breach of another provision of the Convention. More precisely, national constitutional rights qualify as “rights of others” which may justify proportional limitations of Convention rights, but they may not be used to or override Convention rights.

The legal notion of the provision is applicable only when the domestic legislation, in particular the Constitution, can guarantee a higher level of protection of the fundamental right than defined by the European Convention. It should be emphasized, however, that it does not follow directly from the provision of the concept of a minimum standard of protection of human rights that States are obliged in each case to provide for a broader and more comprehensive protection than the content of the Convention. The issue is within the discretion and legal policy of each state.

Moreover, minimum content of rights and freedoms guaranteed by the Europen Convention is being elaborated in the judgments of the European Court of Human Rights. Minimum content of rights and freedoms are described as the irrevocable foundation of a right to which all individuals, in all contexts, and under all circumstances are entitled. The minimum content implies a "threshold" below which no government can go regardless of the economic situation in a country. An example of minimum content in the area of civil and political rights can be found in the right to freedom from arbitrary detention. One element of the content of this right is that a warrant for a person's arrest must be obtained by the state and presented to the individual. Another element of the content is that an individual who is detained cannot be held for an indefinite period of time. In the case of a declared national emergency in which constitutional guarantees are suspended, an individual may be detained without an arrest warrant. However, even in this situation, s/he cannot be deprived from liberty indefinitely. Since the requirement of an arrest warrant can be suspended, this element would not be considered as a part of the minimum content of the right to freedom from arbitrary detention.

The idea of a minimum content has been challenged without concerning that using the word "minimum" limits the full guarantee of rights by setting a low standard for governments. However, in “Health as a Right”, Provea wrote:

“We consider that by establishing a minimum, uniform "floor" below which a state may not descend does not weaken the right in question, provided that the content is understood as a starting point and not as the arrival point. Furthermore, establishing a framework assures a uniform basis to be respected, even by the states with insufficient economic resources or subjected to critical economic situations ***[16, p. 38].***

The principle of setting a minimum standard for the protection of human rights is directly and closely related to the doctrine of the Common European Consensus **[17, pp. 119-139].** By concentrating the minimum standards of human rights protection as guidelines relevant to the development of the legal policies of states, the European Court interprets them in the light of a common pan-European consensus.

In other words, for the approach taken by the European Court of Justice to be considered a minimum standard for the protection of human rights, it must reflect the common pan-European consensus on the subject matter issue. In all cases where there is no consensus of all the member states of the Council of Europe on the issue under consideration - European consensus, the European Court usually considers the matter within the deference of the States. In this way, the European Court expresses its respect for the determination of the normative content of fundamental rights in the absence of the autonomy of states and the common European agreement, and, if necessary, for the determination of the proportionality of the restriction **[18, pp. 62-70].**

The above-mentioned will be considered under the light of Chapman v. UK case. In this case, The European Court, in particular, noted the following: "... The Court observes that there may be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community (2001)"

Today, one of the most commonly used principles of interpretation of the European Convention of Human Rights is the doctrine of margin of appreciation. Margin of appreciation represents the "outer limits of schemes of protection, which are acceptable to the Convention". The doctrine of margin of appreciation has been developed in order to allow the states a space for manoeuvre that the Strasbourg organs are willing to grantnational authorities, in fullling their obligations under the Convention **[19]** and since some interpretation toll was necessary "to draw the line between what is properly a matter for each community to decide at local level and what is so fundamental that it entails the same requirement for all countries whatever the variations in tradition and culture." Before entry into force of Protocol No 15 the margin of appreciation doctrine could not be found in the text of the Convention. It has been developed by the Strasbourg bodies in order to stress the Court's subsidiary role.

However, the extent of the margin of appreciation can vary according to the absence of any European consensus on resolving a particular matter, the aim being pursued, the significance that the Court considers should be attached to a particular aspect of a right and the existence of a conflict between two rights protected by the Convention. According to the judgment of the European Court delivered in Dickson v. United Kingdom case "where, however, there is no consensus within the member States of the Council of Europe either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider. This is particularly so where the case raises complex issues and choices of social strategy: the authorities' direct knowledge of their society and its needs means that they are in principle better placed than the international judge to appreciate what is in the public interest. In such a case, the Court would generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation". There will also usually be a wide margin

accorded if the State is required to strike a balance between competing private and public interests or Convention rights (…) **[20].**

The fact that the European Convention enshrines legal standards for the protection of human rights is indisputable, and no other approach is discussed in the theoretical literature. The situation is different with the judgments of the European Court. Some theorists consider it a characteristic of legal standards to be enshrined in international treaties, treaties or conventions. In other words, the provision cannot be considered a legal standard if it has not received its direct wording in any of the above options. In the light of this ideology, considering the judgments of the European Court, it turns out that they cannot set legal standards. Such an approach is based on the idea that the judgments of the European Court simply interpret and clarify the legal standards already enshrined in the European Convention **[21, p. 12].**

Our view on this issue is as follows. Judgments of the European Court of Human Rights may, in practice, often set legal standards for the following reasons: the European Convention now operates the way it is interpreted in the judgments of the European Court. This suggests that the judgments of the European Court are directly linked to the relevant provisions of the European Convention. Consequently, if the provision of the Convention is itself a legal standard for the protection of human rights, then the judgment of the European Court of Human Rights, which discloses the content of that provision, is an additional interpretation of that legal standard. In other words, if the provisions of the European Convention are legal standards, then the interpretations that specify and clarify their content are also an integral element of the content of the legal standard.

As already discussed above, the characteristics for legal standards are typology indicative nature. We believe that both these features can be attributed to the judgments of the European Court. Moreover, with regard to the indicative nature, it should be noted that the judgments of the European Court are of a guiding nature not only for domestic courts and competent bodies, but also for the European Court itself, which determines the relatively stable nature of European Court judgments.

In order to assess the substantiation of the above justifications, we will examine Article 13 of the European Convention and the interpretations made by the European Court in its judgments. Under Article 13 of the European Convention, *everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity. It is the direct obligation of every state to at least guarantee the existence of an effective remedy.* Article 13 of the Convention sets out two important factors which deserve special attention. State parties are required to provide an effective remedy and that remedy must be exercised in all circumstances, including in the event of a breach by its officials.

It is difficult to disagree with the idea that the wording "effective remedy" is not sufficiently clear and predictable, as it is not possible to unambiguously understand the wording of article- what measures are in question, what violations it refers to, etc.

In its judgments, the European Court clarified the legal content of the provision, set clear criteria that are of guiding importance in assessing the effectiveness of domestic remedies. Thus,

In the event when an individual claiming that he or she has suffered a violation of his or her rights under the European Convention, he or she should seek redress, which will enable the public authorities to decide on his or her grievance and, if appropriate, restore his or her right **[22].**

The extent of a State's obligation under Article 13 varies due to the nature of the complaint. In specific cases, the European Convention requires specific measures. Recognizing, for example, the fundamental importance of the rights protected by Articles 2 and 3, Article 13, in addition to paying compensation, requires, if necessary, an exhaustive, effective investigation that could lead to the identification and liability of those responsible **[23].**

The term "authorities" in Article 13 includes, but is not limited to, judicial authorities. However, if they are not a judicial body, their powers and procedural guarantees should be sufficient to assess the effectiveness of the remedies provided to them **[24].**

There may be cases where a single remedy may not fully meet the requirements of Article 13, but a combination of domestic remedies may do so **[25].**

Conclusion

Thus, the European system of human rights protection, based on the concept of minimum standards for the protection of human rights, does not exclude, but rather, it conditioned *per se* the development of constituent standards that summarize the content of the defined standards and their content. In the light of the foregoing, it becomes clear that the European Court, when interpreting the provisions of the Convention on the issues under its jurisdiction, reveals the scope of the legal standards enshrined in the Convention, applying new standards in its practice.

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