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The implementation of the European Convention on Human Rights and Basic Freedoms in Member States of the Council of Europe

by Mr Rait MARUSTE,
Judge, European Court of Human Rights,
Former Chief Justice of the Supreme Court of Estonia

Introduction

According to the Preamble of the European Convention on Human Rights the governments having drafted that Convention are "resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain rights stated in the Universal Declaration".

Having ratified the Convention, our countries, Estonia and Ukraine, like our predecessors at the Council of Europe, defined themselves as:

- like-minded;

- having common heritage of

a) political traditions;

b) ideals;

c) freedom;

d) the rule of law.

Indicated are the first landmarks in understanding, interpretation and application of the European Convention on Human Rights.

Ukraine, like Estonia, is a member of the Council of Europe. Estonia became a member of the Council of Europe on 14 May 1993. After the compatibility exercise, Estonia ratified the European Convention on Human Rights and its Protocols (except Protocol no. 6) and the ratification entered into force on 16 April 1996[*]. Estonia also recognised the right of its individuals to submit petitions, and the Court's compulsory jurisdiction.

Some common features in Estonian and Ukraine legal doctrine and practice

Despite the fact that our countries are different in size and population, etc., one could nevertheless find some coincidences in our recent legal history, which have influenced our development and are therefore relevant and important today in order to understand the problems under discussion. Estonian legal thinking was and still is quite intensively influenced by legal positivism. Legal positivism and formalistic approach, as you might know, were methodologically dominant in the Continental, mainly German speaking, legal community at the end of the last and in the beginning of this century. It largely remained so also during the Weimar Republic.

The approach springing from Hans Kelsen and his compatriots was transferred into Estonia and dominated legal thinking and practice of Estonia during our first independence period, i.e. from 1918 - 1940. Then, as a result of Soviet occupation and annexation, the whole legal environment was forcibly replaced with soviet-totalitarian regime with its socialist legality (*socialisticeskaja zakonnost*) paradigm.

[*] Protocol No. 6 has since been ratified and is effect.

Positivism and legal formalism left little space for the substantive part of law, its spirit, purpose and equity. Under formalism, the law comes from power and must be implemented. It was not for a judge to ask about the justice of law, whether it accorded with general and internationally recognised principles of law or with the human roots and dimensions. The purpose of the legal system was to protect the system, not an individual.

The totalitarian era directed us not to take the Constitution as a supreme law of the land, but rather as a body of political declarations. Consequently the (Soviet] Constitution was not taken as real law and was not applied in law enforcement practice. It is very complicated to find any judgement, for example, where court had directly applied the Constitution. The same applies to international law, which also had very little if any connection to the real jurisprudence. Therefore, constitutional, international and human rights law were relatively poorly known in the legal community.

The true intention of the founders of Council of Europe and drafters of the Convention was not to be declarative. The intention was and is to take Human Rights seriously. I sincerely hope that Ukraine and Estonian intentions and practice are will be the same.

The collective enforcement which is envisaged in the Convention refers to a collective responsibility which is exercised by the specific organs set up to guarantee the Convention. The fundamental consensus reached in Europe in 1950 must be renewed continuously through the determination of the governments of the European countries. The European Court of Human Rights has held that the Convention "creates, over and above a network of mutual undertakings, objective obligations which, in the words of the Preamble, benefit from a collective enforcement".

The real implementation and protection of Human Rights in a given society can be provided by four main ways:

1. Through the democratic political institutions and organisations created in society and ordering of the affairs of life in the community;

2. Through legal and judicial guarantees and protection mechanisms;

3. Through the activity of those people who know and comprehend their rights and freedoms, and who actively stand up for them;

4. Through the activity of international political co-operation and Human Rights monitoring bodies;

The standards for protection of human being and its dignity laid down first at the United Nations Universal Declaration of Human Rights and afterwards by the European Convention on Human Rights are now generally recognised throughout Europe. But unfortunately it does not mean that they are also and everywhere respected in practice. However, one should not underestimate the revolution which has taken place with the recognition of a common European tradition and practice concerning the protection of human and fundamental rights.

The impact of the European Convention on Human Rights on States Parties

Advanced and democratic constitutional and general jurisprudence in Europe regard human rights as objective rights, which have binding legal effect on all state powers and

institutions, including the legislature. It is an obligation of public authorities and first of all courts to follow these objective principles.

The rights and freedoms could most effectively be protected not on international, but on the domestic level. Indeed, it is primarily domestic law, which guarantees human rights protection, and the Strasbourg system is actually only subsidiary. Therefore an important point is the status and the applicability of the Convention in domestic law. The aim of implementation of the European Convention into national law is to ensure that national law is in conformity with the Convention so that national organs and courts can apply its rules correctly on the national level.

Presently the Council of Europe has 40 member states, which have ratified the ECHR. In over 30 of them the Convention has the force of domestic law. Clear exceptions in this respect are the United Kingdom and Ireland, where domestic law and international law are separate. In Austria, Parliament conferred upon the Convention the status of constitutional law, while in Cyprus, France, Greece, Liechtenstein, Luxembourg, Portugal, Spain, Switzerland, Turkey and also in Estonia the Convention provisions have superior force to any possible conflicting domestic legislation. In other words, those provisions are deemed by national courts to be "directly applicable" and have in practice a superior legal status to both - prior and subsequent legislation.

Thus for example, in Belgium and the Netherlands, where the national courts cannot review conformity of legislation with the Constitution, the courts are able do determine compatibility of such legislation with directly applicable provisions of the Convention. In Switzerland, the federal tribunal has accorded the Convention's substantive provisions a "constitutional consent" equating them, for procedural purposes, with written and unwritten constitutional law. In Turkey no appeal may be made to the Constitutional Court with regard to the Convention on the grounds that the latter is unconstitutional. In Germany, the Convention has been transformed into internal law and possesses a status equivalent to that of other federal legislation and German constitutional jurisprudence accepts the control of compatibility of domestic statutes with binding rules of international law. Likewise, upon ratification, the Convention's substantive provisions were transformed into Italian internal law and, although it is generally accepted that the *rule lex posterior derogat legi priori* applies, the Italian Constitutional Court, in a few instances, implicitly accepted the Conventions quasi-constitutional content.

In countries, which have not incorporated the Convention into their domestic law, specific legislation would need to be implemented for the provisions of the Convention to be cited as legal sources by the judiciary.
However, in these states there does exists a presumption upon which the judiciary will -- in the absence of express statutory indications to the contrary -- interpret internal law to be compatible with the State's international obligations. Although the Convention is not considered as a formal source of internal law, it is nevertheless referred to by domestic courts as persuasive authority when a gap appears to exist in internal law, a clarification of an ambiguity is needed, or when the courts are faced with a doubtful or controversial point of law.

The Convention itself refers to domestic law in several places. For example, Article 1 of the Convention provides that the High Contracting Parties "shall secure to everyone within their jurisdiction the rights and freedom" defined in the Convention. It was clearly repeated and defined in the Ireland v. United Kingdom judgement of 18.January 1978.

The interpretation of Article 13 of the 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 person acting in an official capacity" - is that the text of the Convention does not impose any obligation on the States to incorporate the Convention into their domestic law (James and Others case etc.)

The increase in the number of decisions in national courts applying, or referring to, the Convention reflects the growing importance which the application of the Convention is assuming in the judicial life of States bound by the Convention.

There are many spheres and instances where domestic law and procedures have had to be changed as a consequence of developments and decisions made in Strasbourg, regardless of the status of the Convention in domestic law. In addition, many other instances can be cited where settlements have been reached either formally or informally, often with the Commission's or the Court's approval, subsequent to concessionary measures taken by the governments concerned.

Even though the Strasbourg Court is not a supreme court towards the national judiciary (Supreme Courts) and the Strasbourg Court has no power to intervene in a national judiciary and overrule its decisions, the development has gone in the direction that the decisions of Strasbourg Court in respect of State Party could be regarded as a legal ground for the re-examination of the case at national Supreme Court if the party concerned so wishes. For example, relatively recently such a provision was introduced to the procedural law of Norway and in Estonia the same is under discussion in drafting committee of the new procedural law.

The non-judicial outcome of a decision of the Strasbourg Court may be the change of administrative practice of the state, administrative regulations and law, establishment or change of law-drafting guidelines in general.

State Parties to the Convention, according to the Convention article 46, "undertake to abide by the final judgement of the Court in any case to which they are parties". So without any doubt the judgements of the European Court of Human Rights have legally binding, obligatory effect between the parties and for the State concerned. This legal mechanism is supported by political supervision by the Committee of Ministers, which supervises execution of the Court's decisions.

Inquiries

In addition to the above-described judicial effect, according to the Article 52 of the Convention, the Secretary General Council of Europe is entitled to make inquiries. Art 52 says that "On receipt of request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention". Inquires form a political means of supervision of implementation of the ECHR.

International customary law and Strasbourg case law

Distinctions arise between customary international law and conventional international law in regard to their role and rank in national legal orders. This is natural, because customary international law is formed through the consensus and consistent practice of states and is regarded as binding on that basis alone. The conclusion of treaties and adherence to conventions, by contrast, is a matter of choice of the particular government of the day and may not always

automatically form part of the national legal order. It should be noted, however, that some treaties, or parts of treaties, especially multilateral law-making conventions (like ECHR), may reflect or codify customary international law, which may then call for application as such, and not as conventional international law.

Customary international law becomes automatically part of national law by reason of the provisions of some constitutions. For example, the Constitution of Austria provides that "the generally recognised rules of international law are regarded as integral parts of federal law". The preamble to the French Constitution provides that "la République Française se conforme aux règles du droit public international", and courts have consequently applied customary international law in a number of cases. Paragraph 3 of Estonian Constitution stipulates that "universally recognised principles and norms of international law shall be an inseparable part of the Estonian legal system". Consequently international customary law is an integral part of Estonian legal order.

One practical problem in Estonia, and I suppose also in Ukraine, is that our legal communities, including judges, are relatively ignorant of international customary law and need to be trained. It is crucially significant that domestic courts use the European Convention on Human Rights and take into consideration Strasbourg case-law. Obviously, there is an urgent need to make available in national language translations the most important Strasbourg case-law. This will insure that the European Convention on Human Rights standards are used - when necessary - in the daily work of judges and lawyers as well as other public authorities.

Estonian experience in implementation of the European Convention

The Constitution of 1992 guarantees basic Human Rights to all inhabitants in Estonia. The Estonian "Human Rights Bill" -- Chapter II of the Constitution - Fundamental Rights, Liberties and Freedoms -- is modelled on the basis of most important international Human Rights instruments, including the ECHR. The Constitution establishes Human Rights and liberties for everybody, political rights for all citizens and obliges the legislative, executive and judicial powers and local governments to guarantee rights and freedoms set out in the Constitution (§ 14). The same fully applies also to the rights and freedoms prescribed by the European Convention of Human Rights.

The status of the treaty (ECHR) at the Estonian legal system

The Constitution includes three basic articles that deal with international law and foreign treaties -- namely, articles 3, 121 and 123. These provisions regulate the position of international law norms in the Estonian legal system and the way they are implemented. According to Art. 3 of the Constitution, "Generally recognised principles and rules of international law are an inseparable part of Estonian legal system". Consequently, the Estonian Government and the courts should draft and interpret Estonian laws in a "human-rights-friendly" manner. So one could say that customary international law is a part of Estonian legal system. The norms of international law (for example human rights treaty -- ECHR-provisions) could become an integral part of the Estonian legal system through approval (ratification) of the treaty by the parliament. Ratification gives the treaty provisions domestic validity without repeating the material content of the treaty provisions in a domestic legal act.

The hierarchical status of ratified international treaties in the Estonian legal system is strictly regulated by the Constitution. According to the Constitution, foreign treaties have an

intermediate position between the Constitution and ordinary legislation (acts of parliament). The Constitution is considered a superior source of law because:

1) it was adopted by a direct act of *volonté générale* (by means of referendum);

2) the Constitution itself stipulates that the state power shall be exercised in accordance with the Constitution; and

3) Art. 123 provides that "The Republic of Estonia shall not conclude foreign treaties which are in conflict with the Constitution".

Accordingly the Constitution clearly prevails in possible conflicts between its norms and an international treaty. But a conflict is unlikely to occur as the Constitution itself is modelled on human rights instruments. In the case of conflict between an act of parliament (or lower domestic enactment) and a ratified international treaty, the provisions of the foreign treaty shall be applied" (Art. 123).

The procedure for solving possible conflicts between an act of parliament (or lower domestic enactment) and a ratified treaty is judicial constitutional review, which is regulated by the Constitution and the Constitutional Review Court Procedure Act. But it is not only the obligation of the Constitutional Court to evaluate the conflicts of domestic and international law; it is a general obligation of all branches of the judiciary -- civil, criminal and administrative jurisdiction. It has happened in many cases.

The direct application of treaty provisions in a concrete case depends on how clearly formulated and concrete the treaty provisions are. Principally the question whether a concrete norm of international law is clear and concrete enough or not, is up to the court in question to decide. It is generally recognised that material provisions of the European Human Rights Convention are clear and concrete.

Despite the fact that there are not any legal restrictions to use human rights treaty provisions as a primary argument in court proceedings, it happens relatively seldom. Also there are no objections to using treaty provisions directly as a normative basis of court decisions. But again, it happens very seldom, simply because courts are not used to do it. But ECHR provisions and case law is more and more often used as arguments in the grounds (reasoning) for court decisions. To make use of ECHR provisions and case law more wide spread among the courts, a project has been started to translate most important cases of the Strasbourg court into Estonian. Most Estonian courts have also direct electronic access via Internet to databases of the Strasbourg organs.