



In partnership with Memorial Human Rights Centre (MHRC), the Slavic Centre for Law and Justice (SCLJ) and the Georgian Young Lawyers' Association (GYLA)

## The interpretation of Constitutional Rights in accordance with the European Convention on Human Rights

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In the course of the Warsaw Summit the Heads of State and Government of the Member States of the Council of Europe undertook to ensure that at the national level there are appropriate and effective mechanisms in all member states for verifying the compatibility of legislation and administrative practice with the European Convention on Human Rights (the Convention).<sup>1</sup> The two preconditions to the implementation of this obligation are the interpretation of national legislation (including the Constitution, if there is one in the domestic legal system concerned<sup>2</sup>) in accordance with the Convention, as well as the interpretation of the Convention by the national courts in accordance with the interpretation given by the European Court of Human Rights. The Convention itself does not oblige the contracting parties to make it part of their legal systems and, *a fortiori*, does not provide for a specific place for itself in the hierarchy of domestic norms. As the method in which each state party to the Convention has incorporated it into their domestic legal system has differed,

the status of the Convention in domestic law varies from state to state, which accordingly influences its interpretation by the national courts.

In Austria the Convention is a part of the Federal Constitution and Art. 10(2) of the Spanish Constitution imposes an obligation to interpret constitutional rights in accordance with international agreements on the matter.

However, in other countries the situation is more complicated and interpreting constitutional rights in conformity with the Convention requires specific justification. Thus, in Germany, where the Convention is an ordinary federal law, the Federal Constitutional Court has held that in interpreting the Basic Law, the content and state of development of the Convention are also to be taken into consideration, insofar as this does not lead to a restriction or derogation of basic-rights protection under the Basic Law, an effect that even the Convention itself seeks to rule out.<sup>3</sup>

In France the Convention has a place above ordinary laws, but below the Constitution in the domestic hierarchy of norms. Consequently, the Constitutional Council has held that it is not bound by the Convention and will not verify the conformity of laws with it.<sup>4</sup> However, on several occasions it has read the *Declaration of the Rights of Man and of the Citizen* of 1789 (which is a French constitutional instrument) in the same terms as the Strasbourg Court reads the relevant Convention articles. In particular, the French Constitutional Council has developed the constitutional principle of legal certainty with references to the Declaration of 1789, but the substance of the principle is the same as that found, for example, in the *Sunday Times* or *Kruslin* judgments.<sup>5</sup>

In Russia, where the Convention has the same status as in France, although the Constitutional Court often makes reference to the Convention, the question whether it is bound by the European Court's interpretation of the Convention, when interpreting constitutional rights, remains open. Article 17 of the Constitution, which provides that human rights should be

guaranteed in accordance with the Constitution and universally accepted principles and norms of international law,<sup>6</sup> makes no reference to international treaties. In *I.V. Bogdanov and others*<sup>7</sup> the Constitutional Court reaffirmed that legislative provisions should be interpreted in accordance with the Convention and that judicial decisions must comply with it. Since the Constitutional Court made no reservations as to the types of judicial decisions that should comply with the Convention, it is possible to conclude that it is bound by the interpretation of the Convention by the European Court. However, this does not prevent the Constitutional Court from handing down decisions manifestly incompatible with the Convention.<sup>8</sup>

It is the Supreme Court of the Russian Federation which has been more exigent in interpreting constitutional rights in conformity with the Convention.

In its judgment in the case of *Trade Union of Police of Moscow*<sup>9</sup> it read the constitutional prohibition of forced labour in the same sense as in Art. 4 of the Convention.

In the author's opinion the interpretation of constitutional rights in conformity with the Convention, which is now a matter of national judges' will and the 'dialogue of judges' for the most part, should be grounded on the legal basis that since Constitutional and Convention rights are expressed in the same way, they should have the same interpretation.

Nevertheless, national courts should go further to establish what is the correct manner of interpretation of the Convention. The rules to that effect provided by Section 2 of the Human Rights Act 1998 are extremely helpful for domestic judges (not necessarily just in the United Kingdom, as they reflect the functioning of the Convention in general) in establishing the actual meaning of the Convention in the light of the Strasbourg Court's case-law. According to section 2, judges should take into account any relevant judgment, decision or opinion of the European Court, report and admissibility decision of the former European Commission

of Human Rights or decision of the Committee of Ministers on the merits of cases not referred to the Court under former Art. 46 of the Convention.

This provision establishes a hierarchy of sources: thus, the judgments of the European Court carry greater weight than the decisions of the Commission. It also calls the domestic judges to take into account, that is, examine, case by case, the relevance of the Convention case-law as the Strasbourg judgments may be given on different facts or indeed whether the domestic courts should go further than the European Court in human rights protection relying on the 'living instrument' doctrine.<sup>10</sup>

In sum, it is submitted that the Convention may be effective in domestic legal orders when the courts interpret constitutional rights in accordance with the Convention and give the Convention the same sense as the European Court of Human Rights. If in finding a solution to the first issue every court should find the justification for the interpretation at issue from within its own constitutional system, the second issue is the same for every national court, so the rules on dealing with the Strasbourg case-law set out in the Human Rights Act 1998 may prove relevant outside the British Isles.

<sup>1</sup> Action Plan, CM(2005)80, 17 May 2005.

<sup>2</sup> For this formal reason the British incorporation of the Convention rights by the Human Rights Act 1998 is not considered in this article dealing with the justification of the possibility of the interpretation of constitutional rights in conformity with the Convention.

<sup>3</sup> BverfG, 2 BvR 1226/83 et al., 25.12.1987, *EuGRZ* 1987.449-455.

<sup>4</sup> Cons. const. français, no 75-54 DC, 15.01.1975, *Journal officiel de la République française* 16.01.1975.

<sup>5</sup> Cons. const. français, no 99-421 DC, 16.12.1999, *Journal officiel de la République française* 22.12.1999.

<sup>6</sup> Of which Common Article 3 to the Geneva Convention is perhaps the only provision dealing with human rights.

<sup>7</sup> 25.01.2001, no. 1-P, (2001) 7 *SZRF* 700.

<sup>8</sup> See, e.g., *Commissioner for Human Rights, PTK "Sodeystvie", AO "Kareliya"*, 11.05.2005, no. 5-P, (2005) 22 *SZRF* 2194.

<sup>9</sup> No. GKPI 00-1195, 16.11.2000, Bulletin VS RF 2001-7. However, the application of prohibition of forced labour by the Russian Supreme Court in the present case was manifestly incorrect: it struck down the ministerial instruction permitting to move a policeman from one place of work to another without his consent.

<sup>10</sup> For a detailed discussion of the original meaning of the 'take into account clause' see *Human Rights Law and Practice*, eds. Lord Lester of Herne

Hill QC and D. Pannick QC, L., 2003, pp. 31-32; for a critical review of recent British case-law see R. Clayton, "Human Rights Act Six Years On: Where Are We Now", (2007) 1 *EHRLR* 16-20.