ARE JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS THE SOURCE OF THE CIVIL PROCEDURAL LAW OF RUSSIA?

Maxim Ya. Lyubchenko
Master of Law,
Post-graduate of Civil Procedure Department
The Siberian Federal University (Russia)
10-70, Vzletnaya St., Krasnoyarsk, Krasnoyarsk Region, Russia, 660135
Tel. 8(902) 950 10 37
E-mail: m.ya.lyubchenko@yandex.ru

This article analyses the significance of the practice of the ECHR for the national courts. The author concludes that the decisions of the ECHR aren't the source of the civil procedural law of Russia.

Contemporary development of law is inevitably influenced by globalization (For the first time in this circumstance drew attention: [41]). According to M. Storme, President Emeritus of the International Association of Procedural Law, this process not only helps understand the increasingly large legal sphere, but also explains prevalence of the phenomenon of the "free movement of court proceedings" [44, p. 17]. We believe, the tendency resulted in adoption of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the Convention) [4] in 1950, as rectified by the Russian Federation in 1998 [5].

Article 19 of the Convention implies creation of a separate convention mechanism, the European Court of Human Rights (hereinafter ECHR, the Court), which is supposed first to guarantee observance and protection of the fundamental rights enshrined by the Convention and second to "interpret their general wordings into the language of certain rules and principles" [19, p. 82–83]. Investigation of the interaction mechanism between ECHR and national jurisdictions seems to be of substantive scientific and practical value, however, it should be preceded by the analysis of the role and importance of the Court acts in current circumstances. In other words, the researcher must determine whether ECHR judgments contain norms of international law and whether they are therefore the source of the civil procedural law of Russia. The issue was many times addressed both by the doctrine[1], and court practice [46; 49; 50; 51], the unambiguous answer is still unavailable though.

[1] On the question about the meaning of the regulations of the ECHR as a source of civil procedural law: [9; 10; 22; 23; 24; 25; 31; 34; 36]. On the question about the meaning of the judicial practice as a source of civil procedural law: [11; 12; 29; 38].

Pursuant to the Constitution of the Russian Federation [1] article 71 item "o", the exclusive source of the civil procedural law is federal legislation. In this regard, civil procedure for federal courts of general jurisdiction is prescribed by the Constitution of the Russian Federation, Federal Constitutional Law on the Judicial System of the Russian Federation, the Code, and other federal laws passed in accordance therewith, whereas the civil procedure for magistrate courts is also determined by Federal Law on Magistrate Judges of the Russian Federation (the RF Code of Civil Procedure (further CCP) [3] Part 1 Article 1). The list is exhaustive, and judgments of the ECHR are not mentioned therein. RF CCP Article 11 Part 1 contains a complete list of the regulatory legal acts to be applied by court for a civil proceeding. Judgments of the ECHR are not named among them either.

Nevertheless, both RF CCP Article 1 and RF CCP Article correspond to the RF Constitution Article 15 Part 4 and proclaim the supremacy of generally recognized principles and norms of the international law and RF international treaties over the national civil procedural legislation (Part 2 and Part 4 respectively). The following three variants of the international law participation in domestic law-enforcement processes shall be considered therewith: 1) independent application of international norms; 2) joint application of international norms and national norms with related subject of regulation; and 3) preferential application of international norms instead of norms of the Russian law in case of inconsistency between the two sources [28].

Thus, in order to recognize judgments of the ECHR as a source of the civil procedural law pursuant to RF Constitution Article 15 Part 4 and corresponding norms of the procedural legislation, the judgments should first be recognized as a source of international law, for recognition and applying the Convention itself within the legal framework does not yet mean recognition of ECHR judgments as a mandatory source. The reason is that the Convention can be a part of national law as applies by courts, while the competence for interpretation can be vested in courts that apply the Convention as a domestic law [13, p. 86]. The said stage is missing in arguments of most of the authors addressing the issue.

For instance, in recognizing judgments of the ECHR as a source of civil procedural law, advocates of the approach rely upon provisions of Article 1 of the Federal Law on Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols Thereto, under which Russian Federation has admitted the jurisdiction and decisions of the Convention ipso facto and without a specific agreement, and on para b item 2 Article 31 of the Vienna Convention on the Law of Treaties [2], which obliges the states to consider in interpreting an international treaty subsequent practical application of such treaty along with context thereof, to the extent of agreement between the parties in respect of such interpretation [20, p. 156]. In the opinion of I.V. Vorontsova and T.V. Solovyeva, this means that whereases of ECHR judgments shall have binding effect for national authorities [18, p. 6]. Moreover, ECHR judgments for the recognition of violation of the convention rights is said to vest the state with liability not only to make payments adjudicated as a fair compensation,

but also to take actions generally in order to avoid such violations within the national legal framework [21, p. 938–946]. An additional argument for the approach is provided by judgments of the Constitutional Court of the Russian Federation № 2-П [46] of February 5, 2007 and № 4-П [47] of February 26, 2010 where the court concludes that "…like the Convention, judgments of the ECHR are an integral part of Russian legal framework, to the extent they interpret, in accordance with generally recognized principles and norms of international law, the content of the rights and freedoms enshrined by the Convention".

At the same time, the above conclusion seems to be premature, and the line of arguments can be a point of discussion for the reasons as follow.

First, judgments of the ECHR are primarily addressed to the defending state, and contain indirect appeal to the state bodies, namely, legislative, executive, judicial authorities and their public officials [16, p. 237], while the binding nature of such judgments does not by itself testify the fact that they are the sources of law [17, p. 7]. Most probably, this is not a matter of obligation for national courts to immediately apply the judgments, but rather a responsibility of the state to «transform» them into the domestic legal framework. In this context, independent application of international law is not required.

Second, para "b" item 2 Article 31 of the Vienna Convention on the Law of Treaties (hereinafter the Vienna Convention) does not deal with every practice, but only with the one that "stipulates agreement between the parties on interpretation of a treaty". In the opinion of authors of comment to the Vienna Convention, value of the Convention depends on how exactly it demonstrates availability of the mutual agreement between the parties on understanding of a treaty [15, p. 83]. Extrapolating the assertion to any decision of the ECHR would mean ignoring the agreed intentions of the states when signing an international treaty. All the more contravening to the Vienna Conventions are the conclusions drawn by the ECHR in para 71 of the judgment in Loizidou vs Turkey that "… the Convention norms cannot be construed only according to the author's opinions expressed more than forty years ago" [53], even though as of the moment of adoption of the Convention the number of states was only a half of current number of the Convention members [35, p. 35].

Third, we believe that the Constitutional Court of the Russian Federation in its judgments № 2-П of February 5, 2007 and № 4-П of February 26, 2010 did not mean to recognize the ECHR practice as a source of the civil procedural law. The point is that the judicial science operates the notion of legal framework as a complex comprising not only law as an aggregate of legal norms, but also the procedure for interpreting the same, as well as the entire process of applying the norms, legal awareness issues and the status of legal order based on the above [28, p. 248]. It is in this regard, we believe, that the Constitutional Court of the Russian Federation attributed judgments of the ECHR to the so called informative precedent [40, p. 353; 11, p. 155–156], i. e. the rule of construing which is not an independent source of law, but which is *taken into consideration* by parties and the court in interpreting the convention norms avoiding direct

references thereto. Similar opinion was expressed by V.D. Zorkin who mentioned: "It is in the interpretation of the Strasbourg Court that the norm is through decisions of national instances implemented into the domestic legal framework; and in this case we deal with "a precedent of interpretation" determined by the national court that applies the Convention to its decision…" [27, p. 111].

While the issue concerning application of international treaties should be deemed settled [48; 49], the uniform notion of generally recognized norms of international law is missing from references. According to S.B. Bakhin, defining generally recognized norms is one of the most complicated and debating points [9, p. 119]. Attributing decisions of international courts to the generally recognized principles and norms of international law is still more controversial. The doctrine knows two approaches to the problem solution.

The first approach can be described by words of Russian civilest I.A. Pokrovskiy who thought it necessary to "… admit that the paramount principles of the old philosophy of law, namely, up-front regulation of relations by law, elimination of judicial outrage and written law postulate, proved to be a mere utopia. The oppression of lifeless texts is obviously a heavier burden for contemporary civilized peoples than despotism of rulers. Small errors of judges, capable of thinking and feeling, are anyway better than fancies of the paper tyrants" [32, p. 29]. Almost half a century afterwards, in 1961, similar approach to international courts was defined by English lawyer D. Fitzmaurice: "… International community is specifically dependent on international courts in terms of law development and elaboration and making it more substantial than the force that can be based on practice of various states, which is frequently controversial and indefinite, or on opinions of certain authors, whatever high the reputation of the authors may be" [42, p. 14].

The most informed opinion on the issue was expressed by A. Ferdross who believed that a court judgment should never rely exclusively on certain previous decision or a doctrine. It may, instead, make use of them to establish a norm of international law that is not straightforward enough yet [37, p. 164–165]. Similarly, L. Oppenheim [43, p. 31] and Y. Brounly [14, p. 47] presume that decisions of international courts does not form international law, and G. Schwarzenberger points out in addition that international court judgments may be of pure persuasive nature [45, p. 255].

Most of domestic scientists share the opinion. L.N. Shestakov presumes that international courts do not create norms of international law but just apply those existing [39, p. 25]. B. L. Zimnenko believes that in spite of the binding nature, such decisions are not statutory, essentially, and therefore shall not be considered a source of international law [26, p. 63].

Thus, there are no grounds for recognizing judgments of the ECHR as a source of civil procedural law and, therefore, national legal practitioners have no reasons to have them covered by Constitution of the Russian Federation Article 15 part 4 and RF CCP Articles 1 and 11. We suppose it is possible to reveal the legal nature of the judgments through the informative precedent pattern. We agree with A.T. Bonner who states that the latter "…exist in our

situation in a "mild" or latent form; they are quite often referred to by representatives of parties and occasionally by prosecutors" [11, p. 156], however, the possibility of direct application of the judgments in judicial acts is doubtful.

As an additional argument to support the above conclusion, we would mention para 4 of the Judgment of the Plenary Assembly of the Russian Federation Supreme Court concerning court judgment, which determines that since, pursuant to RF CCP Article 198 part 4, a judgment must contain an indication to the law that the court was guided by, the whereases should specify the substantive law applied by court to the subject legal relations and the procedural rules followed by the court. Courts should also, among others, *consider* those judgments of the ECHR that offer interpretation of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms to be applied in the case. We should therefore agree with the opinion that the Plenary Assembly of the Russian Federation Supreme Court isolated statute as a source of law from law enforcement acts of the ECHR [33, p. 16]. The same line is maintained by the legislator in Article 2 para 2 of the Federal Law of the Russian Federation on compensation for violation of the right to legal proceeding in reasonable terms, or the right to judicial act execution in reasonable terms [52], which prescribes that compensation for violation of the right to legal proceeding or judicial act execution in reasonable terms shall be determined by court, arbitration court depending on petitioner's requirements, factual background of the case where such violation is found, duration of the violation and importance of effects of the violation for the petitioner, subject to principles of soundness and fairness and practice of the ECHR.

It should be mentioned that similar approach has been developed in some European countries as well. For instance, in its judgment of 2004 in the case Gorgulu vs Germany Federal Constitutional Court of Germany recommended German courts to *take into consideration* judgments of the ECHR, i.e. "… take note of and apply in certain case relevant provision of the Convention in the manner it is construed by the European Court, to the extent such application is consistent with any superior law, in particular, constitutional law".

In Great Britain, in accordance with section 2.1.a of the Human Rights Act 1998 [6], a court or a tribunal considering the matter which is related to any right guaranteed by the Convention, must *take into consideration* any judgment, decision, declaration or opinion of ECHR judge, if such judgment, decision, declaration or opinion is relevant for the proceeding. In terms of comments to the provision, Lord Chief Justice Bingham noted in his judgment in R (Ullah) vs Special Adjudicator that national court "… should not reduce or mitigate the effect of Strasbourg practice without a convincing argument"; and that the court it to "… keep pace with Strasbourg practice, for it is evolving in time: nothing more, but definitely nothing less". However, as R. Cross fairly noted, "each judgment must be read in the light of judgment in other cases" [30, p. 61], and hence judgment in R (Ullah) vs Special Adjudicator is subject to interpretation in correlation with judgments in R vs Homcastle and others, R vs Boyd and others, where supplement criteria are provided

setting the margins for national courts in their adhering to the ECHR practice.

Finally, Interlaken Declaration [8] and Brighton Declaration [7] encourage states to ensure or introduce actions that may help prevent any possible violations of the Convention, while the Convention itself and practice of the European Court should be *taken into account* by national judicial authorities (p. 4 and p. 7 respectively).

This article does not contain any categorical propositions or claim final resolution of the discussion. It is rather a statement of author's own assessment of the issue for the purpose of its further scientific elaboration.

BIBLIOGRAPHY

1. Конституция РФ: принята всенародным голосованием 12 дек. 1993 г. (с послед. изм.). *СЗ РФ*, 2009, № 4, ст. 445.
2. Венская конвенция о праве международных договоров: заключена в Вене 23 мая 1969 г. *Сборник международных договоров СССР*, 1988, Выпуск XLII.
3. Гражданский процессуальный кодекс Российской Федерации: ФЗ РФ от 14 ноября 2002 г. № 138-ФЗ (с послед. изм.). *СЗ РФ*, 2002, № 46, ст. 4532.
4. Конвенция о защите прав человека и основных свобод: заключена в г. Риме 4 ноября 1950 г. *СЗ РФ*, 2001, № 2, ст. 163.
5. О ратификации Конвенции о защите прав человека и основных свобод и протоколов к ней: ФЗ РФ от 30 марта 1998 г. № 54-ФЗ. *СЗ РФ*, 1998, № 14, ст. 1514.
6. Human Rights Act 1998: <http://www.legislation.gov.uk/ukpga/1998/42/section/2>.
7. Brighton Declaration. In *High Level Conference on the Future of the European Court of Human Rights*. 19–20 April 2012: <https://wcd.coe.int/ViewDoc.jsp?id=1934031>.
8. Interlaken Declaration. In *High Level Conference on the Future of the European Court of Human Rights*. 19 February 2010: <https://wcd.coe.int/ViewDoc.jsp?id=1591969>.
9. БАХИН, С. В. Международная составляющая правовой системы России. *Правоведение*, 2008, № 7, с. 117–130.
10. БЛАЖЕЕВ, В. К вопросу о механизме гармонизации российского гражданского процессуального права и практики Европейского Суда по правам человека. *Гражданский процесс в межкультурном диалоге: евразийский контекст*: Всемирная конференция Международной ассоциации процессуального права, 18–21 сентября 2012 г. Москва, Россия: сб. докладов / Под ред. Д. Я. Малешина. Москва, 2012, с. 446–456.
11. БОННЕР, А. Т. Судебный прецедент в российской правовой системе. *Российский ежегодник гражданского и арбитражного процесса*, 2004, № 3, с. 151–161.
12. БОРИСОВА, Е. А. Судебная практика как источник гражданского процессуального права. *Российский ежегодник гражданского и арбитражного процесса*, 2004, № 3, с. 173–183.
13. БРАГЪЕВА, А. Право толкования: конституционные суды и Конвенция о защите прав человека и основных свобод (на примере Венгрии). *Сравнительное конституционное обозрение*, 2011, № 2(81).
14. БРОУНЛИ, Я. *Международное право* / Под ред. Г. И. Тункина. Книга 1. Москва, 1977.
15. *Венская конвенция о праве международных договоров. Комментарий* / Под ред. Н. В. Захарова. Москва, 1997.
16. ВИТРУК, Н. В. О юридической силе решений Европейского суда по правам человека. *Общепризнанные принципы и нормы международного права и международные договоры в практике конституционного правосудия: Материалы Всероссийского совещания*. Москва, 2004.
17. ВИТРУК, Н. В. Практика Конституционного Суда Российской Федерации в контексте действия Конвенции о защите прав человека и основных свобод. *Российское правосудие*, 2006, № 3.

18. ВОРОНЦОВА, И. В.; СОЛОВЬЕВА, Т. В. *Постановления Европейского суда по правам человека в гражданском процессе Российской Федерации* / Под ред. О. В. Исаенковой. Москва: Волтерс Клувер, 2010.
19. ГАРЛИЦКИЙ, Л. «Конституционные ценности» и Страсбургский суд. *Сравнительное конституционное обозрение*, 2008, № 6 (67).
20. ГЛАЗКОВА, М. Е. Значение прецедентной практики Европейского Суда по правам человека для отправления правосудия по гражданским делам в Российской Федерации. *Журнал зарубежного законодательства и сравнительного правоведения*, 2007, № 1.
21. Де САЛЬВИА, М. *Прецеденты Европейского Суда по правам человека. Руководящие принципы судебной практики, относящейся к Европейской Конвенции о защите прав человека и основынх свобод. Судебная практика с 1960 по 2002 г*. Санкт-Петербург, 2004. С. 938–946.
22. ЕРШОВ, Е. А.; ЕРШОВ, В. В. Прецеденты толкования Европейского суда по правам человека. *Российское правосудие*, 2007, № 7, с. 12–25.
23. ЕРШОВА, Е. А. Правовая природа постановлений Европейского Суда по правам человека. *Трудовое право*, 2009, № 2.
24. ЖИЛИН, Г. А. Правосудие по гражданским делам: актуальные вопросы: монография. Москва, 2010.
25. ЖИЛИН, Г. А. Решения Европейского суда по правам человека в системе источников гражданского и арбитражного процессуального права. *Журнал конституционного правосудия*, 2009, № 1, с. 23–29.
26. ЗИМНЕНКО, Б. Л. *Международное право и правовая система Российской Федерации. Общая часть: Курс лекций*. Москва, 2010.
27. ЗОРЬКИН, В. Д. Диалог Конституционного Суда Российской Федерации и Европейского Суда по правам человека в контексте конституционного правопорядка. *Сравнительное конституционное обозрение*, 2011, № 1(80).
28. ИГНАТЕНКО, Г. В. Применение норм международного права в российской правовой системе. *Правовая реформа в России: проблемы теории и практики: материалы Всероссийской научно-практической конференции.* Екатеринбург, 1996, с. 36–41.
29. КАЗАНЦЕВ, С. М. Проблема единообразия судебной практики в Российской Федерации. *Российский ежегодник гражданского и арбитражного процесса*, 2004, № 3, с. 162–172.
30. КРОСС, Р. *Прецедент в английском праве* / Под общ. ред. Ф. М. Решетникова. Москва: Юридическая литература, 1985.
31. МАЛЕШИН, Д. Я. Роль судебной практики в правоприменительной деятельности. *Юридический мир*, 2009, № 1, с. 55–60.
32. ПОКРОВСКИЙ, И. А. «Прагматизм» и «релятивизм». *Вестник гражданского права*, 1916, № 5.
33. *Практика применения Гражданского процессуального кодекса Российской Федерации: Практическое пособие* / Под ред. В. М. Жуйкова. Москва, 2005.
34. РЕХТИНА, И. В. Постановления Европейского Суда по правам человека как фактор, обуславливающий динамику гражданского процессуального законодательства России. *Современное право*, 2011, № 4, с. 81–85.
35. РУСИНОВА, В. Н. Правовые аспекты применения Конвенции о защите прав человека и основных свобод: до и после «Банковича». *Московский журнал международного права*, 2010, № 1.
36. СУЛТАНОВ, А. Р. Правовые позиции постановлений Конституционного Суда РФ и постановлений ЕСПЧ и их правовое значение для гражданского процесса. *Законодательство и экономика*, 2011, № 4, с. 87–92.
37. ФЕРДРОСС, А. *Международное право*. Москва, 1959.
38. ЦИХОЦКИЙ, А. В. Теоретические проблемы эффективности правосудия по гражданским делам: Дис. д-ра юрид. наук. Москва, 2007, с. 239–245.
39. ШЕСТАКОВ, Л. Н. Императивные нормы в системе современного международного права. Москва, 1982.
40. ЯСТРЖЕМБСКИЙ, И. А. Современное понимание сущности судебного прецедента. *Lex russica: Науч. тр. Московский государственной юридической академии*, 2004, № 1.
41. CAPPELLETTI, M. *Access to justice and the welfare state*. Publications of the European University Institute. Florence, 1981.

42. FITZMAURICE, D. Hersch Lauterpacht «The Scholar as Judge». *BYBIL*, 1961, Vol. 37.
43. OPPENHEIM, L. *International law* (ed. by H. Lauterpacht). London, New York [etc.]: Longmans, Green, and co, 1905, Vol. I.
44. STORME, M. Tomorrow's civil trial. *The recent tendencies of development in civil procedural law – between East and West*. Vilnius: Justitia, 2007.
45. SCHWARZENBERGER, G. A *Manual of International law*. New York: Stevens and Sons, 1952.
46. По делу о проверке конституционности положений статей 16, 20, 112, 336, 376, 377, 380, 381, 382, 383, 387, 388 и 389 Гражданского процессуального кодекса Российской Федерации…: Пост. КС РФ от 5 февр. 2007 № 2-П. *СЗ РФ*, 2007, № 7, ст. 932.
47. По делу о проверке конституционности части второй статьи 392 Гражданского процессуального кодекса Российской Федерации …: Пост. КС РФ от 26 февр. 2010 № 4-П. *СЗ РФ*, 2010, № 11, ст. 1255.
48. По делу о проверке конституционности пункта 1 статьи 23 Федерального закона «О международных договорах Российской Федерации» …: Пост. КС РФ от 27 марта 2012 г № 8-П. *СЗ РФ*, 2012, № 15, ст. 1810.
49. О применении судами общей юрисдикции общепризнанных принципов и норм международного права и международных договоров Российской Федерации: Пост. ПВС РФ от 10 окт. 2003 г. № 5. *БВС РФ*, 2003, № 12.
50. О судебном решении: Пост. ПВС РФ от 19 дек. 2003 г. № 23. *БВС РФ*, 2004, № 2.
51. Об основных положениях, применяемых Европейским Судом по правам человека при защите имущественных прав и права на правосудие: Инф. письмо ВАС РФ от 20 дек. 1999 г. № С1-7/СМП-1341. *Вестник ВАС РФ*, 2000, № 2.
52. О компенсации за нарушение права на судопроизводство в разумный срок или права на исполнение судебного акта в разумный срок: ФЗ РФ от 30 апр. 2010 г. № 68-ФЗ. *СЗ РФ*, 2010, № 18, ст. 2144.
53. Judgment of the ECHR in the case of the "Loizidou vs Turkey" of March 23, 1995.

Įteikta 2013 m. vasario 26 d.
Priimta publikuoti 2013 m. kovo 21 d.