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CONVENȚIA PENTRU APĂRAREA DREPTURILOR OMULUI ȘI A LIBERTĂȚILOR FUNDAMENTALE, CA O CONDIȚIE PREALABILĂ PENTRU INTERACȚIUNEA DINTRE CURTEA EUROPEANĂ A DREPTURILOR OMULUI ȘI JURISDICȚIA JUDICIARĂ NAȚIONALĂ A REPUBLICII MOLDOVA ÎN CAUZE CIVILE.

CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS AS A PREREQUISITE FOR INTERACTION BETWEEN THE EUROPEAN COURT OF HUMAN RIGHTS AND THE NATIONAL JUDICIAL JURISDICTION OF THE REPUBLIC OF MOLDOVA IN CIVIL CASES.

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Rezumat. *Problema interacțiunii dintre Curtea Europeană a Drepturilor Omului și organele judiciare naționale este relevată prin prisma procedurilor civile și a coordonării orizontale a procedurilor civile. Aceasta a devenit deosebit de relevantă datorită participării Republicii Moldova la Convenția pentru apărarea drepturilor omului și a libertăților fundamentale din 1950.*

Cuvinte-cheie: *proceduri civile, justiție națională, interacțiune, convenție, Rebublica Moldova, CEDO.*

Summary. *The problem of interaction between the European Court of Human Rights and national judicial bodies is revealed through the prism of civil proceedings and horizontal coordination of civil proceedings. It has become especially relevant due to the participation of the Republic of Moldova in the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950*

Key words: *civil procedures, national justice, interaction, convention, Republic of Moldova, ECHR.*

Introduction

The Republic of Moldova ratified the European Convention in 1997. This means that, on the one hand, citizens and organizations have the right to appeal to the European Court of Human Rights against violations by the state of the rights guaranteed by the

Convention, after exhausting domestic legal remedies; on the other hand, the Republic of Moldova falls under the jurisdiction of the European Court of Human Rights with regard to the payment of just satisfaction.

This situation has long shaped the prevailing view in the legislative, executive and scientific spheres that the European Court of Human Rights should be included in the hierarchy of national judicial bodies as the highest body exercising judicial functions. In this context, the only correct way to consider the legal status of the ECHR is its implementation, i.e. the decisions of the ECHR should be reflected in the national legal order.

However, as recent innovations in legislation and law enforcement in various legal systems (Great Britain, Germany, Italy, Austria) have shown, states are no longer content with the model of "Strasbourg said - case closed", but are interested in establishing a "dialogue" with the international court", and not only at the international level, but also at the level of domestic law.

The latter is possible only if there is an effective legal mechanism for interaction between the jurisdiction and the ECHR, and also provided that the legal position of the ECHR is applied domestically in civil proceedings, taking into account, and not as an indisputable constant imposed on itself. In this context, the European Court of Human Rights finds itself in the position of a secondary interpreter of conventional rights, which was the original intention of the drafters of the Convention. The primary interpreters should be the national courts themselves, which must, firstly, interpret Article 6 of the European Convention on Human Rights in the given context and in the light of the purpose and intentions of the international treaty, and secondly, take into account the existing practice of international courts.

As a result, a number of ontological and applied problems become real. The legal nature of the activities of the European Court of Human Rights in coordinating civil proceedings, as well as the legal nature and legal consequences of the legal positions contained in its rulings and decisions, require scientific analysis and definition. The seemingly traditional question of the role and place of the ECHR in the sources of procedural law requires a qualitative rethinking; there is an obvious need for a theoretical understanding of the mechanisms of interaction between the ECHR and national judicial bodies, as well as for developing proposals for their practical implementation. All this determines ***the relevance of the topic of this study*** .

Research and Findings

The previously studied ontology of interaction between the ECHR and national judicial bodies allows us to identify the prerequisites for this interaction: the universality of interaction between the ECHR and national judicial bodies is created and implemented through specific procedural actions and interpretation of the basic principles of civil procedural law in a broad sense. It reflects a pattern. It mediates the main (procedural) interaction between the ECHR as an international judicial body and national judicial bodies, and by their legal nature, decisions taken by the ECHR are acts of informal interpretation of the Convention, which must be taken into account when applying the norms of the Convention.

In this study, paragraph (1) of Article 6 of the European Convention on Human Rights plays the role of an interactive premise. Paragraph (1) of Article 6 is a normative component of the Resolution of the Parliament of the Republic of Moldova "On the Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as Additional Protocols to this Convention" No. 1298 of 24.07.1997[16], the legal basis for the inclusion of the Convention in the legal system of the Republic of Moldova and a conventional norm defining the ontological standards of judicial value.

In order to clarify its nature, it seems necessary to turn to the understanding of the origin of law in the general theory of law, on the basis of which further conclusions are drawn. In legal literature, the dominant approach is that laws are organized in an orderly manner into systems (legal systems), in particular, characterized by a hierarchy (legal systems). [14, pp . 381-390] This approach has its origins in the purely legal theory of G. Kelsen, with a slight modification of the doctrine of the Argentine legal scholar K. Cosio. According to this theory, the legal system does not consist of agreed norms of one level; rather, it is a hierarchical structure of higher and lower legal norms, linked to each other by deterministic or subordination relations. [10, p . 180]

The basis for this approach is also provided by procedural legislation: having established that a normative legal act does not correspond to a normative legal act that has greater legal force, the court applies the provisions of the act that has the greatest legal force.[2]

In other words, a legal system is a "fixed geometric structure with a base and an apex" in which higher sources of law have greater legal force than lower ones, have priority, and are applied directly in the event of a dispute (lex superior derogat legi inferiori).

According to Part (1) of Article 2 of the Civil Procedure Code of the Republic of Moldova, the system of legislation on civil proceedings consists of the Constitution of the Republic of Moldova, decisions and rulings of the European Court of Human Rights and rulings of the Constitutional Court, this code and other organic laws. [2]

Interpreting the above legal provisions in conjunction with the Law of the Republic of Moldova "On International Treaties" No. 595 of September 24, 1999.[11] Most authors state that ratified and officially published international treaties of the Republic of Moldova (including the ECHR) are among the sources of procedural law that have the greatest legal force.

In particular, O.V. Abzanova points out that the sources of the arbitration process include international treaties that are part of the legal system and have priority over national legal norms (among such international treaties, the author cites the European Convention on Human Rights as an approximate list of arbitration procedures involving states). [15, p.202]

This understanding of the role and place of international treaties in the judicial system means that the ECHR is on the second level of the hierarchy (vertical) of sources of procedural law (after the Constitution of the Republic of Moldova), and therefore, according to paragraph (1) of Article 6 of the ECHR, it has priority over the rules of

national procedure, and the courts apply the ECHR directly. refers to the possibility of direct application by the courts. However, there is no interaction in this sense. There are also no grounds for a "dialogue" with the notorious ECHR. In our opinion, we do not agree with this approach.

First of all, as has already been emphasized earlier, the Constitution of the Republic of Moldova [3] incorporates the norms of international treaties, generally recognized principles and norms of international law into the legal system of the Republic of Moldova, and not into the legislative system. Thus, the reference to the Constitution is incorporated into the legal system of the Republic of Moldova. Consequently, the arguments about referring only to part (2) of Article 8 of the Constitution of the Republic of Moldova and recognizing the international legal norms specified therein as a source of domestic procedural law are completely unconvincing.

Secondly, it is necessary to analyze the procedural rules. Thus, the rules of an international convention have priority only if the rules of legal proceedings enshrined in this convention differ from the rules enshrined in law. In this case, we are talking about a set of rules regulating the procedure for legal proceedings and the procedure for the activities of each participant in the process - in a word, about the rules that constitute the form of civilized legal proceedings.

Article 6(1) of the ECHR differs from others: it does not regulate legal proceedings, but establishes internationally recognized requirements for the quality of judicial protection. This approach allows us to classify the right to a fair trial, enshrined in the ECHR, as a generally recognized principle of international law, that is, as a fundamental imperative norm of international law (jus cogens), accepted and recognized by the international community as a whole.

By comparing Article 6 of the European Convention on Human Rights with Article 8 of the Universal Declaration of Human Rights of 1948, additional arguments can be made in favour of the above understanding of the legal nature of the rights under analysis. Since the norms of the Universal Declaration of Human Rights of 1948 are undoubtedly generally recognised norms, the nature of Article 6 of the ECHR should be determined in the same way, since its content is similar.

Thus, on the basis of Part (1) of Article 2 of the Civil Procedure Code of the Republic of Moldova, it is impossible to conclude that the ECHR is recognized as a source of procedural law. Consequently, it would be incorrect to refer to these legal provisions to prove the possibility of direct application of the ECHR in procedural relations.

The position of Ya.F. Farkhtdinov, set out in his dissertation research (2002), seems somewhat contradictory, this is due to the fact that, on the one hand, the scientist concludes that "the inclusion of international treaties in the legal system does not mean their incorporation into the domestic legal system," that "the norms of international law do not mechanically become domestic law, that an international treaty cannot be a source of domestic civil procedural law," on the other hand, he comes to the conclusion that international treaties related to the legal system are a source of domestic law. Since it is impossible to be a source of domestic law and at the same time be outside the legal system, a certain imbalance is observed in the concepts proposed by the author. [7, p.198]

In general, such practice seems questionable. We are talking about legal acts that have equal legal force (for example, the European Convention on Human Rights and the Convention on Legal Assistance - both international treaties, in the ratification and official publication of which the Republic of Moldova participated, which affects the administration of justice), therefore it is incorrect to grant one of them the status of a source of national law. It is incorrect to grant one treaty the status of a national source of law and to deny such status to another treaty only on the basis of the presence of rules of legal procedure in it. Note: The Constitution of the Republic of Moldova also does not provide for procedural forms, but the legislator has expressly provided for them, which, undoubtedly, are a source of procedural law and do not require academic discussion.

Does the exclusion of the ECHR from the system of sources of procedural law mean that the ECHR cannot be applied to procedural relations? Does this mean that the ECHR cannot be applied to procedural relations? The answer to this question cannot be found in the works of scholars who adhere to this point of view.

In our opinion, the most justified approach is that according to which the norms of international treaties are not included in the legal system, but are an element of the system of sources of international law, representing the essence of an independent phenomenon that interacts with international law "on an equal footing", without being absorbed by domestic law and without changing its legal nature.

This conclusion is based on the analysis of the traditional doctrines of dualism and monism, which were developed both in the general theory of law and in the science of international law.[13, pp.15-16] The German scholar A. von Bogdandi wrote: "From a scientific point of view, dualistic and monistic theories are incompatible", they are "zombies" of the ideas of a bygone era, which either found refuge or were destroyed." [1, p.400]

In general, we agree with this assessment, but also recognize that these theories are crucial to solving the problems analyzed. As these theories developed, a new approach emerged - the theory of cooperation (interaction), which is gaining more and more supporters.

The point is that the systems of international and domestic law operate in different areas and therefore do not contradict each other. According to the eminent Italian jurist D. Anziolotti, "to speak of a conflict between international law and domestic law is as inaccurate as to speak of a conflict between the laws of different states." [4, p.69] The English jurist J. Brownlie said: "International law is characterized as a harmonizing law that does not provide for the automatic abolition of domestic norms incompatible with obligations in the international sense." [8, p.69]

The answer to the question of the role and place of international treaties in the national legal system should be sought in the interaction between them, and not in the dichotomy of "international law - domestic law", which gives preference to one of them over the other.

Thus, according to G.V. Ignatenko, sources of law are elements of the corresponding legal system, which differ in domestic and international law. An attempt to classify all acts applied by our country and its institutions as Soviet sources of law would mean

mixing completely different categories of law. According to the scientist, both national and international sources of law can be applied in the country's legal system. According to the author, the combination of various sources of law in conditions of coordinated implementation forms a "law enforcement complex". [9, p.140]

A. Voskuhle of the Federal Constitutional Court of Germany contrasted the hierarchical approach [the idea of the "pyramid" mentioned above] with the "mobile" idea or, as he put it, "mobile sculpture consists of a large number of elements that can be moved, but they are connected to each other by ropes and wires to keep them in balance." He writes figuratively that "mobile sculpture consists of a mass of elements that can be moved, but they are connected to each other by ropes and wires that keep them in balance." [19, pp.8-12]

The European Convention is not a source of domestic procedural law. By its legal nature, it is an element of the system of sources of international law and an independent legal system in the system of legal procedures of the Republic of Moldova. The Constitution of the Republic of Moldova proclaims that the European Convention on Human Rights has the same status in the national legal system as all its components, such as procedural law norms, legal relations, legal activity, legal consciousness and legal culture.

Neither the Constitution of the Republic of Moldova nor the Resolution of the Parliament of the Republic of Moldova on the ratification of the European Convention on Human Rights have changed the legal nature of the European Convention on Human Rights as an international treaty between states, nor the sources of procedural law of the Republic of Moldova. The issue is the attribution of legal significance to the European Convention (taking into account the interpretation of the European Convention by the European Court) in relation to the norms of national law, through the operation of the principle of conformity between international law and Moldovan law in various legal systems. This is a matter of interaction between jurisdiction and the European Court (as an interpreting body). Thus, the norms of national procedural law are the "channel" through which the rights guaranteed by the European Convention on Human Rights penetrate into national legislation.

Thus, paragraph 1 of Article 6 of the ECHR as a normative component of the Law of the Republic of Moldova on the ratification of the European Convention on Human Rights is a necessary condition for the interaction of the European Court of Human Rights with the national judicial system in the field of civil proceedings. The interaction of the European Court of Human Rights with national judicial bodies in the field of civil proceedings is a necessary condition.

As has been said before, if the European Convention on Human Rights does not contain procedural rules, then what kind of interaction can we talk about? The answer to this question already exists in modern procedural law.

According to T.V. Sakhnova, this interaction is determined by ontology, that is, the nature of civilization processes and their inherent values, formed by historical development. According to this scholar, the right to judicial protection arose and developed in the domestic legal space long before the conclusion of the European Convention, but

since 1950, the right to a fair and public trial within a reasonable time by independent and impartial courts created on the basis of law has been formed in the legal space. As T.V. Sakhnova writes, "from the particular to the general, but at the same time from the general to the particular," we see a historical logical turn in the civil process. [17, p.14]

In essence, Sir L. Hoffmann and Robert Spano defended the same argument, emphasizing the need to preserve the national content and domestic mechanisms of application of the rights enshrined in the Convention. They argued that the human rights enshrined in the European Convention are universal only at the abstract level, while remaining domestic at the level of application, since the interpretation of these rights requires taking into account a variety of compromises and reservations that are possible only in the context of a given society and its legal system. [12; 18, p . 492]

We endorse this approach. It is important to note that the right to a fair standard of judicial protection is not imposed on States by the Convention, just as the European Convention on Human Rights itself "did not emerge out of thin air or as a result of 'divine revelation', but reflects the ancient aspirations of European humanists." It has emerged throughout the history of civil procedure. [6, p.104]Jurisprudence began as a science of justice and injustice, manifesting itself primarily as a benevolent interpretation of the law, whose main concern is not the letter of the law, but its content and meaning. In his 8th Book of Answers, Modestinus wrote: "It is intolerable to any sense of right or judicial benevolence that laws created for the benefit of mankind should be transformed by harsh interpretations into laws whose severity is contrary to the well-being of mankind." He must make a decision in such a way that the authority of his dignity is increased by his reason" (Callistratus, On Judicial Inquiry, Vol. 1).[5, p.113]

The values that emerged from historical development were subsequently generally accepted as the minimum standards to which judicial protection in a state governed by the rule of law must be subject, which was ultimately reflected in Article 6 (1) of the European Convention on Human Rights. If we look at the preamble to the Convention, it is particularly clear that "the common heritage of political traditions, ideals, freedoms and the rule of law" is reflected there. These values returned to national processes with a new status (as generally recognized principles of international law).

Conclusion

Thus, the effect of the generally recognized principles of international law in the national legal space is a two-pronged process. On the one hand, Article 6 (1) of the European Convention on Human Rights was formed under the influence of the norms of national procedural law of various jurisdictions, which determined its content; on the other hand, having been formed, it had to operate in the national legal space along with national legal norms. In this context, international law must operate in a non-traditional and heterogeneous sphere. In other words, it must regulate relations between individuals, and not between subjects of international law. In this sphere, international law can function only with the help and through the mediation of domestic law. In civil proceedings, this function is implemented by the norms of national procedural law, which represent a mechanism for interaction between the ECHR and national judicial bodies.

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