INTERPRETATION AND APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: METHODOLOGICAL FRAMEWORK

A. N. Rusov,
Candidat of juridical sciences

In 1998 Russia ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter — the European Convention, the Convention)[1]. Thereafter all its provisions and all judgements of the European Court of Human Rights that interpret it (hereinafter — the European Court, the Court) became binding upon our country.

Mr. Laptev, the former Representative of the Russian Federation at the European Court of Human Rights, rightly assumed that "State and municipal bodies of the Russian Federation including the judiciary have to comply with the case-law of the Court and to take into consideration its judgements whatever country they involve"[2].

Admitting that each provision of the Convention has its distinct features and its own sphere of application there may be a reasonable question to ask whether it is possible to elaborate a single system of methods used by the Court to apply and to interpret the Convention. We incline to giving a positive answer to this question due to the following considerations.

Firstly, all the provisions despite of apparent differences between them are integral parts of a single legal document, that is, the European Convention. It functions in a certain social and legal context; it has its own legislative history, specific object and purpose. Secondly, there is a single body responsible for interpreting and applying the Convention's provisions — the European Court. The Court has repeatedly held that the Convention and its Protocols shall be read "as a whole"[3]. Analysis of the Court's case-law demonstrates that it has used the same concepts

[1] See the Federal Law of the Russian Federation of 30 March 1998 no. 54-FZ "On the ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols".

[2] *Laptev P.A. Pravovaya sistema Rossii i evropeiskie pravovye standarty* // Otechestvennye Zapiski. 2003. No. 2 (11).

[3] *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, §57; *Johnston and Others v. the United Kingdom*, judgment of 18 December 1986, Series A no. 112, §57.

to interpret Convention clauses dealing with different human rights. Thirdly, virtually every application lodged with the Court has a complex nature because the applicants refer to alleged violations of several human rights. Therefore, to consider such applications the Court has to examine the same set of facts under the head of different Articles of the Convention. It compels the Court to employ similar methods when considering the Articles referred to. Such an approach inherently implies a certain "superposition" with regard to the scopes of application of the respective Convention provisions, and it entails the use of similar techniques to examine their contents and the specifics of their application. Fourthly, there is an objective pursued by the Court in all cases, namely to find a fair balance between personal, State and social interests[4]. Implementing this objective implies using the same methods for balancing these sorts of interests.

The Convention and the Court constitute a system whose elements are closely connected and influence each other. On the one hand, the Court clarifies the meaning of the Convention provisions determining thereby the manner in which they should be applied in a particular case. On the other hand, many procedural issues underlying the functioning of the Court are governed by the Convention; moreover, the Convention outlines the scope of judicial review of the authorities' conduct exercised by the Court.

Thus, the Court influences the Convention in the process of the process of interpreting its provisions and the Convention influences the Court in the process of applying them to the circumstances of a particular case.

Interpretation of the Convention is aimed at explaining the substance of the Article to be construed while the purpose of its application is to find out whether it had been violated by the respondent State. Since interpretation and application of the Convention have different purposes they require different methods and approaches to be used. Therefore, making a difference between them is particularly important from the methodological point of view. It seems that it is this difference that makes it possible to examine methods, approaches and principles applied by the Court.

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[4] With respect to different Articles of the Convention see the following judgments: James and Others v. the United Kingdom, judgment of 21 February 1986, Series A, no. 98, §50; Lithgow and Others v. the United Kingdom, judgment of 8 July 1986, Series A, no. 102, §120; Sporrong and Lönnroth v. Sweden, judgment of 23 September 1982, Series A, no. 52, §69, §73; Tre Tractorer AB v. Sweden, judgment of 7 July 1989, Series A, no. 159, §59 etc.

Let us see what interpretation of the Convention by the Court is. In general theory of law interpretation of legal norms means a cognitive activity aimed at clarifying the content of the legal norm stated in the text of a legal act[5]. From the point of view of the European human rights law, this definition seems quite a doubtful one. Firstly, it regards interpretation only as a process while it may also mean stating instructions on how the Convention's provisions should be construed in a particular case. Secondly, the European Court abstains from interpreting the Convention's Articles *in abstracto* and determines their meaning in the light of the factual and legal framework of the case before it[6]. Interpretation of an Article in one judgment can affect interpretation of the same Article in another judgment only if — and to the extent that — the circumstances of the two cases coincide. Thirdly, provided that interpretation of law is a "cognitive activity", the above definition gives no idea of what the nature of this activity may be. Fourthly, this definition does not explain how the conclusions reached by the Court while interpreting the Convention influence the manner in which the Convention is to be applied.

In order to produce a new definition of interpretation exercised by the European Court it is necessary to understand what is the actual content of a Convention provision in the circumstances of a particular case. This contents relates to how the respondent State had to act in order to comply with the European standards. In no case may the Convention or the Court offer to the State only one way to comply with those standards; there should rather be several such ways. Thus, interpretation of the Convention by the European Court means transformation of what it prescribes in general to what it requires of the respondent State in every particular case. The word "transformation" here may imply both the process of interpretation and stating its results in the Court's judgments.

Now let us see what application of the Convention means. In general theory of law application of a legal norm is the process of adopting decisions (judgements) by authorised bodies (for the purposes of the present research, the European Court) with the view to establish, change, or cancel legal relations between appropriate parties on the basis of the appropriate legal norms (for the purposes of the present re-

[5] See for example: *Syrykh V.M.* Teoriya gosudarstva i prava. M.: Bylina, 1998. P. 224.

[6] *Tumanov V.A.* Evropeiskii sud po pravam cheloveka: ocherk organizatsii i deyatel'nosti. M., Norma, 2001. P. 57. See also: *Gaskin v. the United Kingdom*, judgment of 7 July 1989, Series A, no. 160, §37; *Beard v. the United Kingdom*, judgment of 18 January 2001, §7; *A. D. T. v. the United Kingdom*, judgment of 31 July 2000, Reports 2000-IX, §11.

search, the Provisions of Section I of the Convention)[7]. When applied in the sphere of European human rights law, this definition cannot but be challenged. Firstly, the European Court (like any other supranational judicial body) can only hold that the Convention and/or its Protocols are breached and to award a just satisfaction to the applicant. The logic of the Convention suggests that any further measures have to be taken by the respondent State. Secondly, the definition makes no difference between applying the Convention in a particular case and examining the case on its merits which results in rendering a judgment. Probably, it is due to this reason that the role of the application of the Convention has not been duly analysed by foreign as well as domestic legal scholars. Thirdly, the definition suggests no methods for the Court to use when applying the Convention. Fourthly, the definition makes it difficult to separate interpretation of the Convention from its application and to explain how the results of one process are to be used in the course of the other. Therefore, the traditional definition of application needs to be substantially clarified.

Hence, interpretation and application of the Convention are equally important for making a deliberate well-grounded judgment on the merits of the case in hand. In the case-law of the European Court the interpretation of the Convention is warranted by its application, and *vice versa*; these processes always take place simultaneously, they have common origin and are governed by the same legal principles.

When deciding cases the European Court employs a large number of specific terms. These terms may be divided into two groups. The first group consists of terms that may be found in text of the Convention. They are subject to interpretation exercised by the Court. The second group comprises concepts that are not mentioned in the Convention but have rather been invented by the Court itself. Their purpose is to promote a uniform manner in which the Court applies the Convention. Every such concept underlies an appropriate application technique. The Court may apply its interpretation techniques only to those terms that belong to the first group. The only way to understand what concepts of the second group mean is to monitor their use in the Court's case-law. On the other hand, analysis of any application method is impossible without taking these concepts into consideration. Thus, the application of the Convention by the European Court is based on a complex of application techniques and the concepts on which they are based.

[7] *Syrykh V.M.* Op. cit. P. 256.

The Court has repeatedly acknowledged that the main goal it seeks to achieve when deciding cases is to find a fair balance between personal, State and social interests[8]. However, it is only on rare occasions that the Court discloses what fair balance is and how it has to be reached. Meanwhile, the question of what interests prevail in a case in hand is a decisive factor which determines the outcome of its examination.

One can say that all application techniques used by the Court are based on looking for a fair balance between different interests. Therefore, balancing these interests may take place at any stage of proceedings.

There are two main approaches to how a fair balance may be reached. The first approach asserts that every application filed to the European Court is caused by a State interference with the applicant's rights, either actual or alleged. In this situation, the interests of the parties contradict each other. The task of the Court is to find out the interests of which party dominate in the case accounting to relevant social interests. When performing this task the Court may look at the role that the allegedly violated rights play in a democratic society and the gravity of the injury inflicted on the applicant including non-pecuniary damage. If it is personal interests that prevail than the Court must hold that the Convention was breached.

The second approach avers that State interests may be considered as legitimate only if they ultimately comply with personal interests. Therefore, the reasons of State's actions or failure to act and its consequences must be consistent with the principle of due respect for human rights.

It has to be stressed that while looking for a fair balance the Court takes into consideration only the *reasons* of State's conduct and its *consequences* but not the conduct itself which is examined by the Court under the head of margin of appreciation or by the use of positive obligations of the respondent State.

With respect to consequences caused by State interference with human rights the Court has worked out the following rule: the damage prevented by State authorities should exceed the damage actually caused by such interference. Thus, according to the second approach the Court should see what interests of the parties have in common instead of playing them against each other.

Examination of cases often involves dealing with issues that have traditionally been considered by public international law as sovereign

[8] See, *inter alia*, *Powell and Rayner v. the United Kingdom*, judgment of 21 February 1990, Series A, no. 172, §41; *Air Canada v. the United Kingdom*, judgment of 5 May 1995, Series A, no. 316-A, §29 etc.

matters falling under the exclusive jurisdiction of the respondent State. Both the European Commission of Human Rights and the Court were not set up to substitute national authorities in deciding their domestic policy issues. The purpose of these bodies is rather to control whether domestically adopted decisions comply with the Convention requirements and to encourage thereby emerging of European standards in the sphere of human rights protection[9]. In order to decide this sensible problem the Court introduced the concept it calls "margin of appreciation". It serves to reconcile the doctrine of State sovereignty and the need for monitoring violations of human rights. Margin of appreciation implies that national authorities may do whatever they deem reasonable until their actions breach the Convention provisions. This idea is supported by the very structure of the Convention: Article 1 obliges States to secure the rights and freedoms defined in the Convention while Article 19 sets up a court to ensure the observance of the engagements undertaken by national governments. By its very nature, the margin of appreciation doctrine may be applied to any Article of the Convention[10]. According to it the discretion given to national authorities is not unlimited and is subject to supervision exercised by the Court[11].

The Convention does not define the scope of the margin of appreciation in a comprehensive way. It should rather be regulated by domestic legislation, State bodies or State officials as well as by judges interpreting domestic laws.

Thus, the margin of appreciation does not prescribe to States to act in a particular way; it rather reflects the status of national authorities as guarantors of human rights and freedoms, the European Court being a supervisory body and the Convention being a source of European standards in the sphere of human rights protection. It allows to reconcile the State sovereignty while in the same time taking into account its obligations under the Convention[12]. Therefore, the margin of appreciation introduces the principle of subsidiarity to the case-law of the Court. Ac-

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[9] *Powell and Rayner*, Op. cit., §44.

[10] With regard to Article 3 of the Convention see *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A, no. 161; with respect to Article 8 of the Convention see *Airey v. Ireland*, judgment of 9 October 1979, Series A, no. 32; with respect to Article 10 of the Convention see *Handyside v. the United Kingdom*, judgment of 7 December 1976. Series A, no. 24; with respect to Article 1 of the Protocol no. 1 to the Convention see *Sporrong and Lönnroth*, op. cit.

[11] *Handyside*, Op. cit., §49.

[12] Foreing author, *Razumov S.A., Berestnev Yu.Yu.* Evropeiskaya Konventsiya o zaschite prav cheloveka i osnovnyh svobod. Stat'ya 3. Zapreschenie pytok. Pretsedenty i kommentarii. M., 2002. P. 3.

cording to this principle, the Court's jurisdiction is subsidiary in respect of the jurisdiction exercised by national authorities.

On the one hand, the margin of appreciation protects States by giving them some measure of discretion. On the other hand, this discretion is limited by the European Convention. On the one hand, the Court acknowledges that by reason of their direct and continuous contact with the vital forces of their countries, national authorities are in principle in a better position than the international judge to give an opinion on the exact content of certain requirements. On the other hand, it reserves the right to supervise whether these decisions comply with the standards established by the Convention[13].

By virtue of the fact that the margin of appreciation doctrine is in line with State sovereignty in some cases it allows the State to persuade the Court that its interference with the applicant's rights suits best to the interests of a particular democratic society and, therefore, it is justified in the circumstances of the case.

The Court deals with different human rights violations; applicants may raise different claims in respect of the same Article depending on the circumstances of the case; respondent States may try different ways to justify their actions. Therefore, the scope of the margin of appreciation has to vary from one case to another[14].

Thus, on the first stage of using the margin of appreciation the Court has to determine its scope in the circumstances of a particular case. In the Court's judgments one can find references to "wide" or "narrow" margin of appreciation[15]. It seems difficult if not impossible to formulate a set of generalised uniform rules in the domain of determining its scope in a particular case[16] and therefore to predict the precise measure of discretion possessed by the national authorities. How-

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[13] R. St. J. MacDonald. The Margin of Appreciation // The European System for the Protection of Human Rights. Ed. by R. St. J. Macdonald, F. Matscher, H. Petzold. Dordrecht, Boston, London: Martinus Nijhoff, 1993. P. 83.

[14] См. *Handyside*, op. cit., §50; *López Ostra v. Spain*, judgment of 9 September 1994, Series A no. 303-C, §55; *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, §52, §62; Beard, op. cit., §9-10; *Eriksson v. Sweden*, judgment of 22 June 1989, Series A no. 156, §62.

[15] For example, in the cases *James and others*, op. cit., *Johnston and others*, op. cit., *Leander v. Sweden*, judgment of 26 March 1987, Series A, no. 116 margin of appreciation was considered to be wide, and in the cases *Dudgeon v. the United Kingdom*, judgment of 2 October 1981, Series A, no. 45 and *A. D. T.*, op. cit. it was considered to be narrow.

[16] *P. van Dijk, Hoof G. J. H.* Theory and Practice of the European Convention on Human Rights. 2nd ed. Deventer, Boston: Kluwer Law and Taxation Publishers, 1990. P. 91.

ever, we suggest some criteria that help determine the scope of the margin of appreciation.

1. The discretion given to the respondent State depends on the object of the Article the Court is examining, its importance for a democratic society[17]. When the object of the Article is complex the Court tends to widen the margin of appreciation[18].

2. As far as the rights of minorities (homosexual, transsexuals, national minorities) and vulnerable people (women, children etc.) are concerned the Court tends to narrow the margin of appreciation of the respondent government[19].

3. The Court takes into account the principal features of State interference into the applicant's rights (its purpose, reasons, context in the first place)[20].

4. The way how the victim of the interference in question behaves himself or herself may also affect the scope of the margin of appreciation.

5. Member States may take a common position toward one of the issues the case involves[21]. The Court calls this a "common ground". Existence of a common ground may seriously influence the scope of the margin of appreciation. If most European States have similar laws concerning some issue and these laws are applied in a similar manner than the margin of appreciation with respect to this issue is narrow because it implies the duty of national authorities to comply with the existing standards in the area[22]. If Member States disagree on some matters the margin of appreciation with respect to these matters becomes wider[23].

It is the Court itself that ascertains if there is any common ground. It is often criticised for not disclosing the methods it relies upon for this purpose. The Court takes notice of scientific and technological devel-

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[17] *Gillow v. the United Kingdom*, judgment of 24 November 1986, Series A, no. 109, §55.

[18] *Sudre F.* Le droit européenne des Droits de l'Homme, Paris, 1999. P. 44; see also Sporrong and Lönnroth, op. cit.

[19] See, for example, *Marckx v. Belgium*, judgment of 13 June 1979, Series A, no. 31; *Dudgeon*, op. cit.

[20] *Gillow*, op. cit., §55; *Dudgeon*, op. cit., §52; *Norris v. the United Kingdom*, judgment of 26 October 1988, Series A, no. 142, §46.

[21] *P. van Dijk*, op. cit., p. 87; F. Sudre, op. cit., p. 45.

[22] *Sudre F.,* op. cit., p. 45; *Marckx*, op. cit. ; *Shuler-Zgraggen v. Switzerland*, judgment of 24 June 1993, Series A, no. 263; *Goodwin v. the United Kingdom*, judgment of 11 July 2002, application no. 28957/95.

[23] *R. St. J. MacDonald*, op. cit., p. 84; see also *Abdulaziz*, op. cit., §67; *Cossey v. the United Kingdom*, judgment of 27 September 1990, Series A, no. 184, §40.

opments and looks how they affect social position toward the matters that have legal implications in the case before it[24]. Sometimes the Court goes beyond considering national legislation and refers to provisions of international treaties[25] or to law-enforcement practice of other States that are not members of the Council of Europe[26].

The case-law of the Court demonstrates that none of the above-mentioned factors plays a decisive role in determining the scope of the margin of appreciation; their importance may vary depending on the facts of different cases.

On the next stage of using the margin of appreciation doctrine the European Court determines whether the State actions that really took place in the case fall within the scope of the margin of appreciation that the State has in a particular case.

Another function performed by the margin of appreciation is that it determines the standard of scrutiny used by the Court when examining State actions. When the margin of appreciation is narrow the Court would probably decide that there was a breach of the Convention and it would be difficult for a State to justify its actions.

It follows from the above that the scope of the margin of appreciation varies from one case to another. One can try to predict the measure of discretion that the Court would grant national authorities on the basis of the criteria mentioned above. When positions of the applicant and the respondent State are equally grounded it is the margin of appreciation that determines the outcome of the case.

The fact that the European Convention has a special status in the law of international treaties has been recognised not only by the academic community but also by the Court itself[27]. Unlike traditional international agreements the Convention obliges the Contracting Parties to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention (Article 1) and provides for no mutual obligation owed by the States to each other. When the Court interpreted the term "secure" in this formula it reached the conclusion that Article 1 urges States not only to abstain from breaching the European Conven-

[24] As to the change of social position toward transsexuals see, for example, *Goodwin*, op. cit.; toward homosexuals — *Norris*, op. cit., §46; *Sheffield and Horsham v. the United Kingdom*, judgment of 30 July 1998, Reports 1998-V, § 56, 60.

[25] The judgment *Powell and Rayner*, op. cit. refers to the Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface of 7 October 1952.

[26] The judgment in the case of *Goodwin v. the United Kingdom*, op. cit. refers to a decision of the Canadian Supreme Court on euthanasia.

[27] *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A, no. 25. P. 90.

tion but also to take some active measures with the view to prevent potential human rights violations as it is required by the effectiveness principle[28]. Although the Court rejected the idea to extend the theory of positive obligations to the whole fabric of the Convention it supposes that certain active measures, in particular in social and economic areas, are necessary for the proper implementation of the rights defined in the Convention. Some Articles (for example, Article 5, 6 and 14) directly oblige States to take active measures in certain domains of social life. If a State does not take those measures it may be held responsible for that[29]. In the Court's view, States must secure to individuals full enjoyment of their rights not only by abstaining from breaching these rights but also by taking active measures on their protection.

Like margin of appreciation the theory of positive obligations has its own scope of application. When determining whether the respondent State has positive obligations the Court relies upon a fair balance between personal, social and State interests. When it is personal interests that dominate in the case the Court will probably hold that the appropriate State has positive obligations. Among other factors to be taken into consideration we would like to mention the comparative importance that the object of the Article under consideration has in a democratic society and the damage inflicted upon the applicant by the failure of State authorities to protect his or her rights.

State sovereignty, margin of appreciation, and principles of proportionality and reasonableness are the main factors that prevent the theory of positive obligations from being used with respect to all Articles of the Convention. Besides, the Court once held that it does not have to develop a general theory of the positive obligations which may flow from the Convention[30].

Most applications filed to the Court concern State actions which in the applicant's view interfere with his or her rights and freedoms; in this situation, the Court's task is to decide on whether the actions in question violate the Convention. However, some applicants assert that the Convention was breached due to the failure of national authorities to take measures the applicant considers to be necessary to protect his or her rights. When dealing with this kind of applications the Court has

[28] Airey, op. cit., §33; *Stanford v. the United Kingdom*, judgment of 23 February 1994, Series A, no. 282-A, §68.
[29] *Airey*, op. cit., §32-42.
[30] *Platform "Ärtzte für das Leben" v. Austria*, judgment of 21 June 1988, Series A, no. 139, §31.

to ascertain whether the State had a legal obligation under the Convention to take measures required by the applicant.

The method that is used by the Court for this purpose is based on the principle of subsidiarity of the Convention machinery. This gives rise to the following rule: State may abstain from whatever action until this abstention violates the Convention provisions. Therefore, whether the State's failure to act is consistent with European standards depends on existence of positive obligations in the case. If the Court holds that the respondent State has no such obligations any failure of this State to take active measures complained of by the applicant will be accepted regardless of its context.

In order to determine whether the failure of the respondent State to act breaches the Convention the Court has to use special approach which is closely connected with the principle of efficiency in application of the Convention. The Court looks whether this principle will be respected if the respondent State fails to take active measures aimed at preventing further violation of the Convention, investigating the offences that led to the violation in question, punishing those responsible for such offences, etc.

There must be two basic prerequisites for the Court to find a State liable for a failure to act. The objective prerequisite requires that the failure of the State to take requisite measures must be specifically addressed in the application filed to the Court. The subjective prerequisite demands that the Court should find that the State has positive obligations toward the applicant. Sometimes the State does not deny that it had failed to act expecting the Court will impose no positive obligations in the case. It seems that the best defence for the State is to deny its failure to act or, in the alternative, to deny that it has any positive obligations.

Approaches to interpretation of the Convention used by the Court may be divided into two groups. Approaches of the first group are based on the text of the Convention. They include the contextual and teleological approaches. Furthermore, there is a principle according to which all terms of the Convention have autonomous meaning with respect to domestic legislation of every Member State. Unlike other principles of the European system for human rights protection, this one is used only in the sphere of interpretation.

When applying approaches of the second group the Court refers to external sources of law which are not confined to the text of the Convention. The most important positions in this group are taken by comparative and dynamic approaches. By using dynamic, or evolutive, ap-

proach the Court can apply some Convention provisions to new types of State interference into human rights. This allows the Court to take account of new social and legal challenges that did not exist at the time the Convention was adopted.

The European Court rejected the idea of its judgements to be based on national legislation of the Member States because it would be inconsistent with the principle of *stare decisis*. Instead of this, the Court has formulated the principle according to which all European concepts have autonomous meaning vis-à-vis national law of the Member States. When it interprets the Convention in tries to balance various approaches existing in different countries[31]. Because of this approach concepts inherent in the European Convention are not to equate with those inherent in domestic laws. Such an approach secures a uniform manner of interpreting the Convention notwithstanding of what State an application originated from.

The Court has repeatedly stressed that the Convention shall be read "as a whole"[32]. It means, in particular, that when interpreting any provision of the Convention the Court should bear in mind the rest of its provisions. This rule became a basis of the contextual approach. This approach may be applied either on the scale of the whole Convention or on the scale of any of its Articles for example when interpretation of a paragraph of an Article correlates with interpretation of all other paragraphs of this Article.

An issue that falls under one Article may — up to a certain degree — be governed by other Articles of the Convention[33]. This is all the more important because virtually every application lodged with the Court raises a whole lot of various legal issues. In interpretation of the Convention provisions in such cases the use of contextual approach seems not only necessary but inevitable.

Teleological approach is based on the idea that any interpretation of the Convention must be consistent with its object and purpose[34]. According to its Preamble, the purpose of the Convention is to safeguard human rights and to promote their proper implementation. At the level

[31] This position is reflected, for example, in the case of *Wemhoff v. Germany*, judgment of 27 June 1968, Series A, no. 7; *Neumeister v. Austria*, judgment of 7 May 1974, Series A, no. 17; *Ringeisen v. Austria*, judgment of 16 July 1971, Series A, no. 13; *Engel and other v. the United Kingdom*, judgment of 8 June 1976, Series A, no. 22. See also *F. Sudre*, op. cit., p. 35.
[32] *Abdulaziz*, op. cit., §60.
[33] Ibid.
[34] *Wemhoff*, op. cit., §8.

of the Convention taken as a whole the application of this approach entails the same result as the application of the principle of effectiveness.

However, the Court usually interprets not the Convention as a whole but rather its particular provisions. It prefers to do so by referring to the object and purpose of a specific Article[35]. Thus, it is very important to ensure that the result of interpretation of a separate Article does not contradict with the object and purpose of Convention as a whole.

When the Court interprets terms related to a particular Article of the Convention the teleological approach urges the Court to make sure that interpretation of these terms is consistent with the object and purpose of that Article which should coincide with the object and purpose of the Convention as a whole.

With the view to clarify the purpose of an Article the Court may refer to its legislative history (*travaux préparatoires*). The Vienna Convention on the Law of Treaties of 1969 mentions this approach among subsidiary means of interpretation (Article 32). However, the Court applies this approach only in rare occasions.

Sometimes when the Court uses the teleological approach it does not interpret the Convention in a way that would be inconsistent with the object and purpose of any of its Articles or that of the Convention as a whole[36].

When the Court had just been established it was unclear whether it should interpret the Convention literally or it would also have to take into account new social and legal challenges to ensure not only protection but also reasonable development of the rights enshrined in the Convention. The Court opted for the second approach[37] and considered that it is to ensure human rights protection in the maximum possible extent[38]. This approach was later called dynamic, or evolutive[39].

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[35] *Groppera Radio AG and others v. Switzerland*, judgment of 28 March 1990, Series A, no. 173, §61; *Pretto and others v. Italy*, judgment of 8 December 1983, Series A, no. 71, §26-27; *Duinhof and Duijf v. the Netherlands*, judgment of 22 May 1984, Series A, no. 79, §32-37.

[36] See, for example, *Ringeisen*, op. cit., §88; *Beard*, op. cit., §17; *Groppera Radio AG*, op. cit., §61; *Niemietz v. Germany*, judgment of 16 December 1992, Series A, no. 251-B.

[37] *P. van Dijk*, op. cit. P. 77; see also *Stanford*, op. cit., §68; *Goodwin*, op. cit., §74.

[38] *Sudre F.* La Convention européenne des Droits de l'Homme. 24ème ed. corr. Paris, 2004. P. 29.

[39] *Bernhardt R.* Thoughts on the interpretation of human-rights treaties // Protecting Human Rights: the European Dimension // Studies in Honour of Gerard J. Wiarda. 2nd ed. Köln, 1996. P. 69.

Mr. Ganshof van der Meersch has rightly noted that dynamic interpretation of the Convention is conditioned by its very object, namely to ensure the most effective protection of human rights[40]. Moreover, the Preamble of the Convention (as well as the Statute of the Council of Europe) necessitates further development of the concept of human rights.

According to the dynamic approach the Court should take notice of changes in the social position toward questions addressed in the case as well as of the reasons underlying these changes.

Often the Court describes dynamic approach to interpretation of the Convention in the following terms: "the Convention is a living instrument and it must be interpreted in the light of the present-day conditions"[41]. Changing of social conditions is liable to narrowing or widening margin of appreciation and, therefore, directly affect the outcome of the case.

The European Court has to apply dynamic approach with a great care: if it abuses evolutive interpretation this may result in creating new human rights which are not actually fixed in the Convention. This may decrease the effectiveness of human rights protection within the Council of Europe.

Common position of Member States toward some or other issues is reflected from the legal point of view in the concept of European standards. These standards emerge when most European societies take a uniform attitude in respect of these issues. The Court ascertains whether this attitude exists by making a comparative analysis of domestic legislation and practice existing in the Member States. Besides, the Court may take bilateral and multilateral international treaties as the evidence of a common position[42]. One should bear in mind that the Court's judgments may initiate changes in the laws of the Member States and encourage emerging European standards in the appropriate field.

The main problem with the dynamic approach is the following: it results in imposing new obligations which were not originally provided for by the Convention. Admittedly, dynamic interpretation of the Convention is an effective way to accommodate it to the present-day conditions; however, it may result in the Member States to found themselves

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[40] *W. J. Ganshof van der Meersch*. Le caractère «autonome» des termes et la «marge d'appréciation» des gouvernements dans l'interprétation de la Convention européenne des Droits de l'Homme // Protecting Human Rights: the European Dimension. Studies in Honour of Gerard J. Wiarda. 2nd ed. Köln, 1996 — p. 202.

[41] *Cossey*, op. cit., §41-42; *Marckx*, op. cit., §41; *Airey*, op. cit., §26; *Johnston*, op. cit., §53.

[42] *Soering*, op. cit., §97.

bound by the obligations they could not foresee when they ratified the Convention. Thus, they were not able to make reservations with respect to these engagements[43].

To comply with the object and purpose of the Convention and to achieve the fullest possible implementation of various human rights the Court often cites not only national or regional but also international sources. In particular, its judgements refer to:

a) general principles of international law[44];

b) general trends in development of domestic legislation and practice of the Member States[45];

c) bilateral and multilateral treaties concluded on the regional and international level to which the Member States are parties[46];

d) other regional and international treaties concerning protection of human rights[47];

d) case-law of other international courts and tribunals[48];

e) soft-law, i. e. non-binding resolutions of international organisations[49];

f) decisions taken by the courts of non-member States[50];

f) *amicus curtae* reports; opinions produced by non-governmental organisations[51];

Margin of appreciation plays an essential role in the application of the Convention. When used in the sphere of interpretation it results in changes of the scope of State actions that may potentially lead to a breach of the Convention.

Another function played by the margin of appreciation doctrine in interpretation of the Convention is balancing different approaches in the

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[43] *Tumanov V.A.* Op. cit. P. 94.
[44] *Loizidou v. Turkey*, judgment of 23 March 1995, Series A, no. 310, §52.
[45] *Gaskin*, op. cit., §48; *Norris*, op. cit., §46; *Goodwin*, op. cit., §79.
[46] The UN Convention on the Rights of the Child of 20 November 1989 — *Keegan v. Ireland*, judgment of 26 May 1994, Series A, no. 290, §50; the Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface of 1952 — *Powell and Rayner*, op. cit., §44; the Framework Convention for the Protection of National Minorities — *Beard*, op. cit., §12.
[47] For example, the case of *Loizidou v. Turkey*, op. cit., contains references to the American Convention on Human Rights;
[48] For example, in the case of *Loizidou v. Turkey*, op. cit. there are references to the case-law of the International Court of Justice.
[49] Cossey, op. cit., §40 refers to resolutions and recommendations of the Parliamentary Assembly of the Council of Europe.
[50] *Goodwin*, op. cit., §84.
[51] Ibid., §81, §84.

field. In particular, it restricts the use of dynamic approach and helps neutralise its by-effects. Margin of appreciation allows the Court to determine whether the use of the dynamic approach is justified in the circumstances of the case. It also helps the Court to come to a well-balanced interpretation that would better comply with the object and purpose of the Convention and would not decrease its effectiveness. On the basis of the margin of appreciation doctrine there should be carried out a thorough analysis of reasonableness as to the use of dynamic approach. It is possible that the Court would not consider it appropriate to increase State obligations under the Convention.

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Taking into account the results outlined in the present research it becomes possible to propose a new approach to studying the case-law of the European Court. It is based on examination of the general methods used by the Court with regard to different Articles of the Convention. It allows to analyse not only the *text* of the Convention but also the *context* in which it operates. Furthermore, the use of this approach allows not only to predict the outcome of a particular case but also to model the trends in the development of the Court's case-law. Practising lawyers will be able to proceed in a more efficient way when defending in Strasbourg not only the positions of the applicant but also those of the respondent State.