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LEGAL EFFECT OF THE ECTHR'S JUDGMENTS IN THE LEGAL SYSTEM OF RUSSIAN FEDERATION

П. Н. Бірюков. **Юридичне значення рішень ЄСПЛ у правовій системі Російської Федерації**. – Стаття.
У статті розглянуті концептуальні питання місця і ролі рішень ЄСПЛ у правовій системі Російської Федерації. Особливу увагу приділено застосуванню рішень ЄСПЛ російськими судами: як арбітражними, так і загальної юрисдикції.
Ключові слова: Європейський суд з прав людини, правова система Російської Федерації, права людини, джерела права.

П. Н. Бирюков. **Юридическое значение постановлений ЕСПЧ в правовой системе Российской Федерации. –** Статья.
В статье рассмотрены концептуальные вопросы места и роли постановлений ЕСПЧ в правовой системе Российской Федерации. Особое внимание уделено применению решений ЕСПЧ российскими судами: как арбитражными, так и общей юрисдикции.
Ключевые слова: Европейский суд по правам человека, правовая система Российской Федерации, права человека, источники права.

P. Biryukov. **Legal effect of the ECtHR's judgments in the legal system of Russian Federation** – The Article.
The article deals with fundamental questions of European Court of Human Rights judgments arrangement in the Russian legal system. Particular attention is paid to the implementation of European Court of Human Rights judgments by Russian courts, both common and commercial.
Keywords: European Court of Human Rights, legal system of Russian Federation, human rights, sources of law.

Article 1 par. 6 of the Federal act «On the ratification of the Convention for the protection of human rights and fundamental freedoms and the protocols thereto» 1998 provides: «In accordance with article 46 of the Convention the Russian Federation recognizes ipso facto and without special agreement the binding jurisdiction of the European Court

of human rights on the interpretation and application of the Convention and the Protocols thereto in cases of alleged violations of the Russian Federation of the compact acts provisions when the alleged violation have taken place after their entry into force in relation to the Russian Federation».

Under the article 46 of the Convention for the protection of human rights and fundamental freedoms of 1950, the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are. Thus, the ECHR doesn't create new propositions of International Law. The court checks on compliance with the state party to the Convention of 1950. In the decree of 1978 on the case «Ireland v. the United Kingdom» the Court emphasized that its acts «are not only the solution of specific disputes, but also, in a broader sense, explanation, the protection and development of the standards of the Convention». The court also assists to observance by States parties to the Convention of the assumed obligations.

Thus, ECHR acts are not sources of International Law. What is the legal force of the ECHR decisions in the Russian Federation?

The article 6 of the Federal Constitutional Act «On the Judicial System of the Russian Federation» [1] of 1996 provides that bound by the decisions of international courts on the territory of the Russian Federation «is determined by the international treaties of the Russian Federation».

In accordance with provisions of the Federal act «On the ratification of the Convention for the protection of human rights and fundamental freedoms and the Protocols thereto» 1998 [2] decisions of the ECHR, taken in respect of the Russian Federation, are an integral part of the legal system of Russia. The specified judicial acts are binding for all state and municipal authorities. Moreover, the Court judgments are legal facts for the revision of the new circumstances in court decisions, adopted by the national judicial authorities.

For example, in accordance to part 4 of the article 413 of Russian Criminal Procedure Code a new circumstance, which serves as a basis for resumption of proceedings in criminal cases, is «established by the European Court of human rights violation of the provisions of the Convention on the protection of human rights and fundamental freedoms in court of the Russian Federation criminal case related to: a) the application of the Federal law, which is not responded with provisions of the Convention for the protection of human rights and fundamental

freedoms; b) other violations of the provisions of the Convention on the protection of human rights and fundamental freedoms».

In accordance with c. 7 of 311 article of Arbitration Procedural Code «established by the European Court of human rights violation of the provisions of the Convention on the protection of human rights and fundamental freedoms in the consideration of the arbitration court on the particular case in connection with the adoption of a resolution, in which the Complainant appealed to the European Court of human rights», is regarded by the court as a newly discovered circumstance and is the basis for revision of the judicial act.

According to the article 392 of the Civil Procedural Code of the RF, a court rulings that have entered into legal force may be reviewed based on newly discovered circumstance or new circumstances.

Reasons for the review the court rulings which has become effective in law, in particular are: «(1) the newly discovered circumstances specified in the part 3 of this article, which existed at the time of adoption of the decision and were essential to trial of circumstances of the case».

The third part of the article relates following to the new circumstances: «the establishment by the European Court of human rights violations of the provisions of the Convention on the protection of human rights and fundamental freedoms in the court's consideration of a particular case, relative to the adoption of a decision, under which the applicant appealed to the European Court of human rights».

The Plenum of Supreme Court of the RF of October 10, 2003 «On the application by general jurisdiction courts of generally recognized principles and propositions of international law and the international treaties of the Russian Federation» is recommended that the Judicial Department under the Supreme Court of the Russian Federation should inform the judges on the jurisprudence of the ECHR, in particular about the decisions relating to the Russian Federation, by way of the authentic texts and their translations into Russian language.

According to the part 2 of Plenum Supreme Courts № 3, of the Plenum of the Supreme Arbitration Court of February 4, 2010 № 2 «On the Rules of Judicial Disciplinary Tribunal» the grounds for review of the decision of the Judicial Disciplinary Tribunal of newly discovered circumstances are: «establishment by the European Court of human rights violation of the provisions of the Convention on the protection of human rights and fundamental freedoms in the consideration of the case the

Judicial Disciplinary Tribunal, in order the adoption of a decision, under which the applicant appealed to the European Court of human rights».

The part 7 of the Plenum of the Supreme Arbitration Court of June 30, 2011 № 52 «On the application of the provisions of the Arbitration procedural code of the Russian Federation for revision of the judicial acts on new or newly discovered circumstances» reads as follows. According to the forth paragraph of the third part of 311 article of Russian Arbitration procedural code with the application for revision in case of new circumstances in order the European Court of human rights violation of the provisions of the Convention on the protection of human rights and fundamental freedoms in the consideration of the arbitration court of a particular case may contact person who was involved in the case, in order the adoption of a decision, under which the applicant appealed to the European Court of human rights, as well as other persons who were not involved in the present case, but on the rights and duties were taken judicial act by the arbitration court.

Saluting the recognition of the importance of the legislator (and Supreme courts following by the legislator) the decisions of the ECHR, I am not quite able to agree with the approach of the acts of the Court as «newly discovered» or «new» circumstances. In my opinion, we should talk about another thing. ECHR checks on the fact of observing the Convention of 1950 in a particular case. Fact of incorrect application (or non-application) of the Convention had already taken place in the time of state bodies decision-making, which then «appealed» to the ECHR. In other words, the violation of the Convention had already existed; it wasn't simply «seen» (or was intentionally unsaw). What does this «new» or newly discovered fact means?

Therefore, in the context of Russian Constitution (as well as propositions of law of the Criminal procedural code, Arbitration procedural code, Civil procedural code), it has been a violation of international Treaty and the provisions of the forth part of the fifteenth article of the Constitution – «if an international treaty of the Russian Federation fixes other rules than those envisaged by act, the rules of the international agreement shall be applied». I suppose, that in this case another rule should act; the decision of a state body shall be a subject to revocation, because it violates the proposition of substantive or procedural law.

For the purposes of implementation, all ECHR decisions can be conditionally divided into two categories: resolutions adopted by the

Court in respect of the state-party, and the decision in respect of the other states-parties to the Convention.

In accordance with the article 46 of the 1950 Convention, states undertake to abide by the final judgment of the Court in cases to which they are parties. In its first decision, the ECHR noted that, in accordance with the 53 article of the Convention «only states-parties of the Convention that are «parties in the dispute», undertake to comply with the decision of the Court».

Degrees, which are adopted by the Court in respect of the other states-parties of the Convention, formally aren't binding for the countries, who weren't parties to the case. However, these acts may not be taken into account in law-enforcement practice of the national courts, the Decision of the Court provides an interpretation of the Convention and, in it sense, is obligatory for all countries of the Convention.

The former Chairman of the ECHR, R. Risdal, was emphasizing, that «they only perform the principal obligation, under which they are subscribed on the basis of the first article of the Convention, namely: to ensure compliance with the rights and freedoms of any person, which is subjected to their jurisdiction, as it had set in the Convention, but at the same time with the light of the interpretation, which is being given to them by the Court in its decisions». As a rule, the Court shall refer decision on a particular case to the earlier adopted legal acts. Decrees of the ECHR don't have the sign of a normative novelty, because it's represented the interpretation and explanation, reveal the meaning and content of the particular provisions of the Convention, it isn't, in essence, enabling legislation and it doesn't create new legal propositions. The interpretation of the ECHR, which provides provisions of the Convention, becomes a model for solution of similar cases by all States.

Decisions and decrees, which were adopted by the court earlier, are a legal instrument, which is used by the Court for a decision in a similar case. The ECHR ruled that it will come out of earlier decisions on «conclusive consideration», for example, «to ensure that, the interpretation of the Convention was reflected the social changes and continued to meet the requirements of today».

Therefore, under the Court's «practice» is necessary to understand that Court decrees, which were made not only in respect to the Russian Federation, but also to other countries – participants of the Convention and of which the Court proceeds with the examination of specific cases.

In the documents of the Supreme Court of the Russian Federation this fact has been repeatedly confirmed.

The ECHR «recognizes the possible cancellation of entered into force court decision only in exceptional circumstances (judgment of 28th of October, 1999 in the case of Brumarescu v. Romania [3]).

On the basis of the legal nature of the Russian Federation as the state, where branches of the legislation form the system of the interconnected elements, as well as due to the constitutional principles of proportionality, equality and justice, such measures must be adequate for protected values and indeed necessary in terms of the legislation.

This corresponds to paragraph 1 of article 6 of the Convention, 1950 in its understanding by the ECHR, requested, in a Decision of 19 March 1997 on the case of Hornsby v. Greece [4], that the execution of a judgment given by any court must be regarded as an integral part of the «right to a court», since this right would be illusory if the legal system of the state allowed a final, mandatory judicial review is not an act that would impair any of the parties. It corresponds to the first paragraph of the sixth article 6 of the Convention of 1950 in its understanding by the ECHR, which requested in a Decree of 19th of March of 1997 on the case of Hornsby v. Greece, that the execution of a decision, given by any court, must be regarded as an integral part of the «right to a court», because this right would be illusory, if the legal system of the state allowed a final, mandatory judicial review is not an act that would impair any of the parties.

The court has repeatedly emphasized that political parties are a form of Association, which are essential to the proper functioning of democracy (judgment of 30th of January of 1998 in the case of the United Communist party of Turkey and others v. Turkey [5]. Free elections and freedom of political parties lie at the basis of any democratic system, which are interconnected and reinforce each other (Decree of 2nd of March of 1987 in the case of Mathieu-Mohin and Clerfayt v. Belgium [6] and of 19th of February of 1998 in the case of Bowman v. the United Kingdom [7]).

Consequently, Russian courts are obliged to follow the practice of the ECHR and take into account the decrees, taken by the Court in respect of not only Russia, but also of other States. It, of course, will be a guarantee that in the future on similar cases against the Russian Federation would be not issued the same on the content decrees.

The proper implementation by the Russian Federation of decrees of the European court of human rights is an important factor of stability of the Russian legal system. A huge role in it plays the acts of the Supreme courts of the Russian Federation.

Thus, in Decision of the Constitutional Court of the RF of 21.01.2010 № 1-P is made an important conclusion: the provisions of 311 article of the APC of the RF doesn't imply the possibility to give retroactive decrees of the Plenum of the SAC of the RF or the Presidium SAC of the RF, which are containing it legal position on the issue of the application of the provisions of the law, regardless of the nature of legal disputes and established for these cases the constitutional framework of the rule of law with retroactive effect. The Constitutional court referred to the provisions of the Convention and Protocols thereto, as well as based on their legal position of the ECHR, including those expressed in the decisions, which are taken on the basis of the complaints of the Russian citizens.

«Since the change of the interpretation of the highest judicial body law provisions are considered in the Russian judicial practice as grounds for cancellation of entered into force court decisions in the order of supervision, and so on newly discovered circumstances, the European Court of human rights estimates, in the first turn, resulted whether the quashing of the legal force of a court decision was rendered in favor of the applicant, the deterioration of its legal status, established by this act, as well as the compatibility of procedures, in which there occurred such a cancellation, the General principles of the Convention in it interpretation of the ECHR».

The possibility of re-examination of criminal case, in which the person has already been finally acquitted or convicted, shall be allowed, under article 4 of Protocol N 7 to the Convention, if there is evidence of new or newly discovered facts, or if in the course of the previous proceedings were admitted significant breaches that have influenced the outcome of the case. This norm, as articulated in relation to the criminal proceedings, the ECHR by means of interpretation in conjunction with article 6 of the Convention disseminated and to civil cases, finding that the derogation from the principle of legal certainty in these matters it is possible to correct a significant (fundamental) violation of testifying to the improper administration of justice (decree of 23 July 2009 on the case of «Sutyajnik» v. Russia [8]). The quality of conformance of this criterion of the grounds for cancellation of the court decision and of the

validity of the derogation from this principle in a particular case is determined by the ECHR individually for each case.

In a Decision of June 7, 2007, in the case of Kuznetsov v. Russia [9] ECHR stressed that the procedure of reconsideration of the case due to newly discovered circumstances is not in itself contrary to the principle of legal certainty, to the extent to which it is necessary to ensure the fair administration of justice; the court saw itself's goal in determining of compatibility procedure with the provisions of paragraph 1 of article 6 of the Convention on the protection of human rights and fundamental freedoms.

Out of the decisions of the ECHR follow that the abolition of the court decision in connection with given to interpretation of the Supreme court retroactive force can't be considered as a violation of the principle of legal certainty, if it is necessary for the fair administration of justice and the restoration of violated rights. Recognizing a violation of article 6 of the Convention in the cases of this category, the Court does not deny the opportunity to consider changing the interpretation of the law as a newly opened or new circumstances, however, it emphasizes that the variation of the enforcement of interpretation does not justify the abolition of a court judgment in the applicant's favor. The inadmissibility of the abolition is not associated it with the nature of the circumstances, as not existing at the time of the consideration of the case, and the fact that the abolition of the court decision, which since roman law is the «law for parties», have led to a deterioration in the established by this decision of the person.

Thus, the abolition of the court decision in connection with the change of the Supreme judicial body already after the issuance of the decision of interpretation laid down in the basis of rules of law, if it leads to a deterioration of legal status of a citizen established by a judicial decision is considered by the European Court of human rights a person (regardless of the applied procedures cancel) as incompatible with the provisions of the Convention, a criterion of its legitimacy is recognized focus on the protection of acquired the status of a citizen or citizens associations as obviously the weaker party in relations with the state, which ensures the principle of legal certainty as to the legal status of the citizen.

This principle may not be regarded as preventing the cancellation of entered into force court decision, if it is necessary for restoration of the rights of the citizen or the improvement of their legal status (in

particular, on the grounds that otherwise would have been considered unacceptable), which in General corresponds with the General principles of law in time, including giving them the force feedback.

The decision of the Constitutional Court of the Russian Federation dated 11.05.2005 № 5-P emphasizes: Convention for the protection of human rights and fundamental freedoms, establishing in paragraph 2 of article 4 of Protocol no. 7 (in the wording of the Protocol № 11), the right not to be held to be tried or punished twice does not preclude the re-consideration of a case in accordance with the law and penal procedure of the state concerned, if there is evidence of new or newly discovered facts, or if in the course of the previous proceedings have been allowed to have a fundamental, principled nature of the material breach of affecting the outcome of the case, makes a distinction between the re-charge or restarting the tradition of the court for the same crime, which are prohibited in par. 1 of this article, and the resumption of a case in exceptional cases.

From the legal positions should be, that the requirements of legal certainty and stability are not absolute and shall not prevent the resumption of the proceedings in connection with the emergence of new or newly discovered circumstances, or if a significant violations that were made at the previous stages of the process and led to the wrong resolution of the case. A similar position formulated by the European court of human rights in the case Nikitin v. Russia (judgment of 20 July 2004 [10]).

The legislator, by envisaging a – observing enshrined in them the criteria and conditions – procedural mechanisms and procedures for the review and cancellation of entered into legal force of the sentence, shall be obliged to formulate their unconditional basis. This is necessary to avoid arbitrary application of the law and taking into account the fact, that it is a question of the revision of a decision of a judicial authority, which has already entered into force and which, therefore, been finally solved questions about the person's guilt and punishment. Under this exception to the General rule on the prohibition turn for the worse are permitted only as a measure of last resort, when failure to rectify miscarriage of justice would distort the essence of justice, the meaning of a sentence as an act of justice, destroying the necessary balance of constitutionally protected values, including the rights and lawful interests of convicts and victims. The lack of possibility of review of a final court decision in connection with the occurred in the course of the previous proceedings

material breach, which influenced the outcome of the case, would have meant that – contrary to the principle of fairness and based on it the constitutional guarantees of protection of human dignity and judicial protection of human rights and freedoms – such an error of judgment cannot be fixed. It would be also in contradiction with the Convention.

Thus, the judgments of the European Court of human rights are not sources of Russian law in the form of precedent; they only reveal the content of the relevant articles of the Convention of 1950. In the sense, in which they interpret the Convention, the decisions of the ECHR are obligatory for Russia, even if they were made in respect to other States.

Bibliography

1. Федеральный конституционный закон от 31.12.1996 № 1-ФКЗ «О судебной системе Российской Федерации» // Собрание законодательства Российской Федерации. 1997. № 1. Ст. 1; 2001. № 51. Ст. 4825; 2003. № 27. Ст 2698; 2005. № 15. Ст. 1274; 2011. № 50. Ст. 7334.
2. Федеральный закон от 30 марта 1998 г. № 54-ФЗ «О ратификации Конвенции о защите прав человека и основных свобод и Протоколов к ней» // Собрание законодательства Российской Федерации. 1998. № 14. Ст. 1514.
3. Brumarescu v. Romania. № 28342/95 // URL: http://hudoc. echr. coe. int/sites/eng/pages/search. aspx? i=001-58337 (Дата обращения: 15.09.2013).
4. Hornsby v. Greece. № 18357/91 // URL: http://hudoc. echr. coe. int/sites/eng/pages/search. aspx? i=001-58020 (Дата обращения: 15.09.2013).
5. United Communist Party of Turkey and Others v. Turkey. № 133/1996/752/951 // URL: http://hudoc. echr. coe. int/sites/eng/pages/search. aspx? i=001-58128 (Дата обращения: 15.09.2013).
6. Mathieu-Mohin and Clerfayt v. Belgium. № 9267/81// URL: http://hudoc. echr. coe. int/sites/eng/pages/search. aspx? i=001-57536 (Дата обращения: 15.09.2013).
7. Bowman v. United Kingdom. № 24839/94 // URL: http://hudoc. echr. coe. int/sites/eng/pages/search. aspx? i=001-58134 (Дата обращения: 15.09.2013).
8. Sutyazhnik v. Russia. № 8269/02 // URL: http://hudoc. echr. coe. int/sites/eng/pages/search. aspx? i=001-93775 (Дата обращения: 15.09.2013).
9. Kuznetsova v. Russia. № 67579/01 // URL: http://hudoc. echr. coe. int/sites/eng/pages/search. aspx? i=001-72308 (Дата обращения: 15.09.2013).
10. Nikitin v. Russia. № 50178/99 // URL: http://hudoc. echr. coe. int/sites/eng/pages/search. aspx? i=001-88792 (Дата обращения: 15.09.2013).