ESSENCE AND BASIS OF DECISIONS OF THE EUROPEAN COURT (SCIENTIFIC AND PRACTICAL ANALYSIS)

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In the article, based on a legal analysis of the case law of the European Court of Human Rights, the general characteristic of the significance of precedents for the implementation of the principle of margin of appreciation of the States Parties to the Convention is formulated. As a result, the corresponding analysis leads to the conclusion that the state's margin of appreciation depends, at least, on the need to expand the legal framework of a person in accordance with the development of international relations.

Keywords – margin of appreciation, precedent, European Court.

Defining the margin of appreciation, the sphere of state entry, that is, the group of interests, the rights protected by the Convention by important criteria, such as, for example, the existence of consensus between member states, in the sense of legal regulation of public relations. Thus, in the case "B v. France", the Court, having analyzed the legislation of France and the United Kingdom, approved the existence of fundamentally different approaches pertaining to the internal affairs of the state. In the Court's view, the daily inconvenience caused to the applicant cannot be justified on the grounds of protecting the interests of the whole society.

So, despite the lack of consensus on this issue, and accordingly, with full discretion of the State, the Republic of France violated the discretion it possesses in accordance with Art. 8 of the Convention.

In principle, as a result of the analysis of judicial practice on this issue, determining the margin of appreciation, the most important is the assessment of how much and subject to which parameters the margin of appreciation of States become, at least to some degree, predictable for the states themselves. Of course, the legal precedent system formed by the Court, in effect, gives States the opportunity to foresee, to some extent, the possibility of using legal intervention at its limits. However, the Convention system, formed by the case law on the part of the Court, in our estimation, does not provide sufficient opportunity for the participating countries to organize and to some extent anticipate the consequences of their intervention. It is, of course, the principle of the "Convention as a living organism", as defined by the Court. This principle is not reflected in the Convention, but it has wide application in the case law of the Court. It is important to note

It should be noted that in spite of the fact that the Court's decisions have a precedent essence, in the presence of which there is an opportunity for states to ensure predictability to a certain extent, nevertheless, the very essence of precedent decisions is not able to provide predictability and certainty for the state, considering the wide application and impact of the "Convention as a living organism" defined by the Court. That is, the margin of appreciation presupposes the powers that are given to the states that fulfill their international legal obligations, in accordance with international treaties. At the same time, considering the precedent established by the Court, the "Convention as a living organism", the state's margin of appreciation depends, at least, on the need to expand the legal framework of a person in accordance with the development of international relations.

A vivid example of the above is also the decision of the Court in the case against the Republic of Armenia.

This is the decision in the case of "Bayatyan v. Armenia". This case is especially important in the practice of the European Court in that the Chamber by its decision gave a concrete expression to the fact that the applicant's rights were not violated, and the Upper Chamber, using the "Convention as a living organism" clause, determined that the Republic of Armenia violated human rights.

In particular, the Upper Chamber, in order to justify the adoption of the case in its production, appealed to the Government of the RA with the following question:

Given the fact that the Convention is a living organism that must be commented in the light of existing conditions and, that most of the EU member states have recognized the right to refuse military service on the basis of religious considerations or on other grounds, can Article 9, paragraph 1, of the Convention be used in the case of the applicant? [1]

This issue, in itself, already meant a change in the attitude of the Court.

The circumstances of this case are as follows: The applicant complains that his refusal to perform military service in the armed forces of the RA was a manifestation of the use of the right to freedom of thought and conscience and that his deliberations led to interference in this right, which contradicts the conditions of Art. 9 of the Convention.

During the applicant's deliberation, the deliberation on refusing military service on the basis of religious convictions was considered legitimate and justified from the point of view of the Convention. The rights guaranteed by Art. 9, in no way can relate to the exemption from compulsory military service on the basis of religious, political or other convictions. Decisions on the cases of Heudens and Peters on this issue are the last and since then the Court has not made a new decision that would change its previous point of view. By this decision, the Court made it clear that the right to freedom of thought, conscience and religion, established by Art. 9 of the Convention does not apply to cases of exemption from compulsory military service on religious or political grounds. In another similar case, Valsamis v. Greece, the Court held that Art. 9 of the Convention does not provide for the right to waive universal disciplinary rules. Moreover, the Court did not recognize the application of art. 9 in respect of this case under no one of its most recent resolution. The case Thlimmenos v. Greece, according to which the Court did not consider it necessary to draw attention to the question of whether the applicant's initial conviction and the subsequent refusal of the authorities to accept the latter as an accountant were interference in the rights established by Art. 9 of the Convention. 1 Despite the wording of subparagraph (b) of paragraph 3 of Art. 4, the Court did not comment on whether the application of these sanctions to persons refusing military service on religious grounds could in itself violate the rights guaranteed by Art. 9 of the Convention. The Court expressed this approach also in Ülke v. Turkey.[2]

Despite the wording of subparagraph (b) of paragraph 3 of Art. 4, the Court did not draw attention either to the question of whether, in relation to persons refusing military service on religious grounds, the use of the above sanctions may in itself violate the rights guaranteed by Art. 9 of the Convention. The court took a similar approach in the case Ülke v. Turkey.[3]

On the basis of the above-mentioned, the Court once again drew its attention to the fact that up to now, moreover, during the actual circumstances in the case of Bayatyan, the prosecution for refusing military service on religious convictions is not a violation of the rights guaranteed by Art. 9 of the Convention and thus, the RA authorities acted in accordance with the requirements provided by the Convention.

That is, considering the fact that Bayatyan was brought to criminal liability for evading military service in 2005, and in this period, and moreover, in the case investigated one year after, the Court still insisted on this view , that the refusal to perform military service on religious beliefs is inadmissible, therefore, the events held by the Republic of Armenia in 2005 are, at least, legitimate from the point of view of the Convention. It is obvious that the Armenian authorities could not be provided by Court's new comments in Art. 9 of the Convention and, therefore, could not match their actions to possible "new approaches". In our opinion, the existence of a "living organism" of the Convention, in this case, does not imply a change in the Court's approaches to the application of Art. 9 of the Convention.

In this connection, the Chamber of the European Court noted that at the time of the actual circumstances in this case, the Armenian authorities acted in such a way to comply with the requirements of the Convention and could not violate the rights of the applicant guaranteed by part 1 of Article 9 of the Convention, because at that time since 2001 and up to now, the persecution of persons who refuse to perform military service on religious grounds is completely outside the scope of the articles of the Convention.

It is undeniable that in 2001, the RA authorities could not foresee that the Court's opinion on this issue could

[1] cf. Thlimmenos v. Greece, [GC], no. 34369/97, § 43, ECHR 2000-IV)

[2] cf. Ülke v. Turkey case (no. 39437/98, §§ 53-54, 24 January 2006)

[3] cf. Ülke v. Turkey case (no. 39437/98, §§ 53-54, 24 January 2006)

change and even if it had been anticipated, it would not be clear in which direction it would have changed. As Judge Sir Gerald Fitzmaurice noted in the case of Golder v. the United Kingdom, with his separate opinion, "the parties are not obliged to fulfill those main international requirements that are not formulated with sufficient clarity to enable them to understand what they mean, that is, in fact, not provided at all, based (so long as it has to be) on circumstances that have never been detailed or written down. [4] (Golder v. the United Kingdom, separate opinion of Judge Sir Gerald Fitzmaurice, para. 30):

Moreover, especially important is the circumstance that about 60 religious organizations were registered in RA, at the time of the actual circumstances of the case. The relevant provisions of the legislation of the Republic of Armenia provide for equal opportunities for each organization, including equal rights and obligations. And, if each of these societies insists that military service is contrary to their religious views, then a situation would arise where not only the members of the organization "Jehovah's Witnesses", but members of other religious organizations could refuse to fulfill their duties in the matter of protecting their homeland. Moreover, the Constitution of the Republic of Armenia provides for its citizens 3 types of obligations, in particular: protection of the motherland, payment of taxes and duties, and compliance with laws, respect for the rights and freedoms of others. Consequently, the organization "Jehovah's Witnesses" or any other organization can tantamount to insisting that, for example, payment of taxes and duties contradicts their religious beliefs and the state would be compelled not to condemn them, as this could violate the rights guaranteed by Art. 9 of the Convention.

However, even under such conditions, the Upper Chamber of the European Court adopted a decision, which fixed a violation of the applicant's rights. Moreover, this decision was adopted by the Court in the implementation of the principle "The Convention is a living organism". In particular: the Court held that, on the basis of the principle of legal clarity, predictability and equality before the law, the Court should not, without justified reasons, express views different from those previously expressed in previous cases and become a case law, but not to handle the dynamic and evolving approaches of the Court, also can create obstacles to reform[5]. The most urgent need is that the Convention should be commented on and applied in such a way that the protection of rights would be practical and non-binding, rather than theoretical and contrived.[6]

At the same time, the Court also ruled that limited comment on Art. 9 from the side of the Commission, was due to more significant, at that time, approaches. However, many years have passed since the Commission, in cases Grandrath v. the Federal Republic of Germany and X. v. Austria, presented its first substantiation, which excluded the right to refuse military service on religious grounds, from the framework of Art. 9 of the Convention.

In this connection, the Court applies the principle of "the Convention as a living organism", which must be commented on in the light of current circumstances and on the basis of the ideology that prevails in today's democratic states.[7] Since the Court is the paramount and most important system for the protection of human rights, it must take into account the changing conditions of states and to determine the criteria, to respond, for example, to any common developments.[8] Moreover, in determining the concepts and terms included in the content of the Convention, the Court can and must, in addition to the Convention, also take into account the components of international law, as well as their comments, as determined by the competent authorities. While commenting on the provisions of the Convention on Special Cases, the overall study resulting from professional international documents may also be subject to the study of the Court.[9]

That is, the Court tries to justify its point of view in the first place by the fact that at the present stage of development of social relations, it became necessary to define new regulations in this sphere, moreover, the most important is that this approach must be justified by agree-

[4] cf. Golder v. the United Kingdom, seperate edition Sir Gerald Fitzmaurice, пункт 30):

[5] Vilho Eskelinen and Others v. Finland [GC], complaint # 63235/00, paragraph 56, ECHR 2007-IV, and Micallef v. Malta [GC], complaint # 17056/06, paragraph 81, ECHR 2009 -...)

[6] Stafford v. the United Kingdom [GC], complaint # 46295/99, paragraph 68, ECHR 2002-IV, and Christine Goodwin v. the United Kingdom. the United Kingdom [GC], complaint No. 28957/95, paragraph 74, ECHR 2002-VI

[7] cf. among others, Tyrer v. the United Kingdom, 25 April 1978, paragraph 31, Series A # 26; Kress v. France [GC], complaint No. 39594/98, paragraph 70, ECHR 2001-VI; and Christine Goodwin, op. above, paragraph 75

[8] cf. Stafford, decree. above, paragraph 68, and Scoppola v. Italy (# 2) [GC], complaint # 10249/03, paragraph 104, ECHR 2009 -...:

[9] Demir and Baykara v. Turkey [GC], complaint # 34503/97, paragraph 85, November 12, 2008.

ment formed by the attitude of EU member countries to this issue - by consensus. A number of international organizations have already expressed their views on this issue. In particular, comments from the CCIMK (Articles 8 and 18) on the part of the OSCE, which are similar to the Convention (Articles 4 and 9). Initially, the OSCE approach coincided with the approach of the European Commission, according to which the right to refuse military service on the basis of religious beliefs went beyond the scope of Art. 18 CCIMM. Nevertheless, in its General Comment # 22 of 1993, the OSCE changed its previous approach and found that the contentious right could derive from art. 18 In a way, that obligation to use lethal force can create serious contradictions in the manifestations of freedom of conscience and religion or belief. In 2006 The OSCE clearly refused to apply Art. 8 of the CCLMM in respect of two cases brought against South Korea and examined the above complaints solely in the light of Art. 18, considering that there had been a violation of these provisions, since the applicants were prosecuted for refusing military service on the basis of religious convictions.

In the case of European countries, it is necessary to note the Basic Charter of European Union Rights of 2000, which came into force in 2009. Although Art. 10 of the Charter literally reproduces Part 1 of Art. 9 of the Convention, its third part specifies the following: "The right to refuse military service on religious grounds is recognized in accordance with the national legislation on the application of this right." Such an explicit addition undoubtedly has tendencies[1010] cf. among others, Christine Goodwin, the above paragraph. 100, and Scoppola, the above paragraph. 105)

and expresses the universal recognition of this right on the part of the member countries of the European Union, as well as the weight given to this right by modern European society. PACE and the Committee of Ministers, within the framework of the European Union, in a number of cases called on all those participating countries that have not yet made such a decision to recognize the right to refuse military service on religious grounds, moreover, recognition of this right is a prerequisite for membership.

In 2001, PACE, again referring to its previous appeals, in particular noted that this right is the main component of the right to freedom of thought, conscience and religion guaranteed by the Convention, and the Committee of Ministers in 2010, taking as a basis the development of the OSCE case law, including the provisions of the Charter of Fundamental Rights of the European Union, also confirmed similar comments on the definition of freedom of conscience and religion established by Art. 9 of the Convention and suggested that the participating countries provide for conscripts the status of persons entitled to refuse military service on religious grounds.

In view of the foregoing, the Court concluded that the national legislation of a significant part of the participating countries, along with relevant international documents, has reached the point where there is one common approach to the issue under discussion in Europe and beyond.[11] In this context, the Court concluded that a change in the commentary to Art. 9 of the Convention was at least predictable for Armenia, therefore, taking into account the principle "the Convention is a living organism", the Court concluded that the case law established by the Commission with respect to item (b) of Part 3 of Art. 9 and 4 of the Convention, is subject to change.

The analysis of this case clearly shows that the principle of margin of appreciation is not essentially a system of powers given to the state, but the opportunity afforded to the Court on any occasion not only to assess the actions of the state, but also to anticipate and guide the rules of conduct of the state in a long-term perspective.

However, this approach, in our opinion, is based on a very dangerous trend. Particular concern is the obligation imposed on the state by consensus, that the state has not yet assumed, but is already responsible for its implementation. We are talking about the following: In the previous paragraphs of this paper, we have analyzed that, in order to use the principle of margin of appreciation, the Court basically uses the fact of a consensus among the participating countries. That is, if the majority of the participating countries have already adopted a certain approach with regard to settlement or influence with respect to certain public relations, then its availability is already sufficient to spread it to those countries that in a formal sense have not yet adopted this approach. For example, the Court in the case of Bayatyan, based on changes in the case law, established not its case law, not the obligations accepted by the state, but mainly the fact that certain decisions have already been taken by

[10] cf. among others, Christine Goodwin, the above paragraph. 100, and Scoppola, the above paragraph. 105)

[11] Bayatyan against Armenia, Complaint # 23459/03. 0707.2011, item 108

the EU Minister, the OSCE, the PACE, the Committee by the EU Minister, formulas, other consultative documents that have already established a change in the "international society" approach to persons who evade military service on religious grounds. That is, when ratifying the Convention, the Republic of Armenia also ratified Part 3 of Art. 4 of the Convention, which states that military service is not forced labor and, in fact, goes beyond the scope of conventional regulation. Concerning this approach, the Commission adopts decisions in which it sees no violations in the fact of bringing to justice those who refuse to perform military service on religious beliefs. As a result, the state, in accordance with the Convention ratified by it, according to judicial precedents, organizes its internal legislation and judicial practice. However, in 2011 the court, taking into account consultative documents, adopted by international organizations, adopts a decision that establishes that the Republic of Armenia in 2005, violated human rights by bringing him to justice. In particular, the Court found that since a number of international documents established the right to evade military service on the basis of religion, therefore the Republic of Armenia had to provide for the fact that the Court would change its case law. That is, the state, regardless of its domestic legislation, regardless of the fact that it has not yet assumed any obligations, is obliged to establish an appropriate settlement within its own country, taking as a basis the approach of the international society. Here again it should be noted that the state, in fact, is obliged to take as a basis not the obligations imposed by international treaties, but the recommendations of an advisory nature proposed by international organizations. Of course, international agreements are part of the legislation of the state, including the legislation of the Republic of Armenia. Moreover, international agreements prevail over the state legislation, however, all these documents, indicated by the Court, are of an advisory nature and in fact do not establish for the states any legal obligations. Rather, they establish, but establish an obligation to change their legislation in accordance with these recommendations. In any of these documents, in fact, there is an appeal to the participating countries, their willingness to regulate these social relations on the territory of their states. It must be stressed once again that none of them has a binding legal right, therefore, the adoption of these decisions for states does not and can not create any legal consequences, bearing in mind the fact that all these documents state explicitly that the states must make legislation and laws on the basis of the opinions indicated in them. Consequently, the "consensus" established between States on the part of the Court is not the basis of the case-law, but in itself should be provided as a legal source for States. I agree that this approach, being inherently bold enough, can be seriously criticized, but the fact is that there is a consensus, which was reflected in the documents of the consultative commissions of the EU, the Council of Europe, the OSCE, which, according to the ruling of the Court , should be the basis for the provision of legal regulation within states.

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11. Bayatyan against Armenia, Complaint # 23459/03. 0707.2011, item 108

СУЩНОСТЬ И ОСНОВА РЕШЕНИЙ ЕВРОПЕЙСКОГО СУДА (НАУЧНО- ПРАКТИЧЕСКИЙ АНАЛИЗ)

В статье на основе правового анализа прецедентного права Европейского Суда по правам Человека, формулируется наиболее общая характеристика значения прецедентов на реализацию принципа свободы усмотрения со стороны Государств- Участников Конвенции. В итоге, соответствующий анализ приводит к выводу, что границы усмотрения государства зависят, по меньшей мере, от необходимости расширения правовых рамок человека в соответствии с развитием международных отношений.

Ключевые слова – пределы усмотрения, прецедент, Европейкий Суд,

ევროპული სასამართლოს გადაწყვეტილებების საფუძველი და არსი (სამეცნიერო-პრაქტიკული ანალიზი)

გ.ს. კოსტანიანი

ნაშრომში ადამიანის უფლებების ევროპული სასამართლოს პრეცედენტული სამართლის სამართლებრივი ანალიზის საფუძველზე, ჩამოყალიბებულია ყველაზე უფრო ზოგადი დამახასიათებელი პრეცედენტების მნიშვნელობისა შიგა რწმენის თავისუფლების პრინციპის რეალიზაციისათვის (განხორციელებისათვის) კონვენციის მონაწილე სახელმწიფოების მხრიდან.

შედეგად, შესაბამისმა ანალიზმა მიგვიყვანა იმ დასკვნამდე, რომ სახელმწიფოს შინაგანი რწმენის საზღვრები სულ მცირე დამოკიდებულია, ადამიანის უფლებების გაფართოების აუცილებლობაზე საერთაშორისო ურთიერთობების შესაბამისად.

აგროტურიზმის განვითარების პერსპექტივები საქართველოში

რეზიუმე

სტატიაში განხილულია საქართველოში ტურიზმის შედარებით ახალი დარგის, აგროტური-ზმის განვითარების პერსპექტივები. მოყვანილია მსოფლიოში ამ ტურიზის განვითარების რამოდენიმე მოდელი. საქართველოში აგროტურიზმის განვითარებისთვის ყველა პირობა არსებობს: კარგი ბუნებრივი პირობები, მდიდარი კულტურულ-ისტორიული მემკვიდრეობა, ღვინის დაყენების უძველესი კულტურა, ნაციონალური სამზარეულოს უნიკალურობა, სახალხო რეწვის დიდი ტრადიციები, სოფლის მეურნეობის ეკოლოგიურად სუფთა პროდუქტების წარმოების დიდი პოტენციალი. აღნიშნული წინაპირობების ერთობლიობა საშუალებას იძლევა ვიწინასწარმეტყველოთ საქართველოში აგროტურიზმის განვითარების დიდი პერსპექტივები.

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სასოფლო (აგროტურიზმი) ტურიზმი მსოფლიოში სწრაფად ვითარდება; აღსანიშნავია, რომ მსოფლიოში ტურისტების 25-30% სწორედ სასოფლო ტურიზმს ირჩევს. ვნახოთ რა არის სასოფლო ტურიზმი, რა თავისებურებებით გამოირჩევა, რატომ ვითარდება აღმატებული ტემპებით, რა იყო მისი წარმოშობის მიზეზი, როგორია საქართველოში ტურიზმის ამ სახეობის განვიტარების პერსპექტივები.

ჯერ გავერკვეთ ტერმინის დეფინიციაში. დასახელება "სასოფლო ტურიზმი" (Rural Tourizm) ინგლისურენოვან ქვეყნებშია მიღებული, ხოლო რომანულ ენოვან ქვეყნებში გავრცელებულია ტერმინი "აგროტურიზმი" (ტერმინიდანagros); ეს ორივე ტერმინი სინონიმად შეიძლება ჩაითვალოს.

აგროტურიზმი არის ტურინდუსტრიის დარგი, რომელიც ორიენტირებულია ძირითადად ქალაქის მოსახლეობის სოფელ ადგილზე დასვენებაზე და იყენებს ადგილობრივ ბუნებრივ-კლიმატურ, სოციოკულტურულ, ეთნოგრაფიულ, კვების აგრო-პროდუქტებს და სხვა მსგავს რესურსებს, რომლისგანაც იქმნება კომპლექსური ტურისტული პროდუქტი; ქალაქის მცხოვრებ ადამიანებს სურთ მოწყდნენ ქალაქის ხმაურიან, დაძაბულ გარემოს და დაისვენონ სოფელ ადგილას, შედარებით დაბალი ბიუჯეტით, ამასთან ეზიარონ სოფლის მუშაკების - ფერმერების ყოველდღიურ საქმიანობას და შეძლებისდაგვარად მიიღონ მასში მონაწილეობა; ეს მონაწილეობა შეიძლება იყოს ანაზღაურებადი, ან მის გარეშე.

ზაფხულში, განსაკუთრებით სასკოლო და სტუდენტური არდადეგებისას, საქართველოში, ისევე როგორც მის ფარგლებს გარეთ, მიღებული იყო სოფელ ადგილას დასვენება, მაგრამ ეს არ აღიქმებოდა აგროტურიზმად, რადგან, მოსახლეობა ძირითადად საკუთარი მამაპაპეულ სახლებში ისვენებდა(რისი პრაქტიკა ეხლაც არსებობს); ამ შემთხვევაში, სერვისის მიმწოდებელი და მომხმარებელი ერთიდა იგივე პიროვნე-ბა შეიძლება იყოს, ან მათ შორის რაიმე ფულადმატერიალური დაინტერესება არ არსებობდეს. აგროტურიზმი კი ითვალისწინებს ფერმერების მიერ შემოსავლის მიღებას.

ზოგიერთი დასავლელი მკვლევარი მიიჩნევს, რომ სასოფლო და აგროტურიზმი სინონიმები კი არ არიან, არამედ სასოფლო ტურიზმი იყოფა სამ დამოუკიდებელ: აგრო-, ეკო- და ეთნოტურიზმის სახეობებად, რაც არასწორად მიგვაჩნია და აი რატომ: ეკოტურიზმის განხორციელების დესტინაცია შეიძლება სულაც არ იყოს სოფელ ადგილას, ეკოტურისტები შეიძლება ისვენებდნენ ველურ ბუნებაში, უდაბნოში, სასოფლო დასახლებებიდან მოშორებით, მეორე მხრივ, თავისთავად სასოფლო ტურიზმი ეკოტურიზმისათვის დამახასიათებელ, ბუნებისადმი ფრთხილ მიდგომას სულაც არ გამორიცხავს. ამასთან, ეკოტურიზმის განხორციელების ადგილი სოფელი შეიძლება იყოს, მაგრამ ეს ეკოტურიზმის კერძო შემთხვევად შეიძლება განვიხილოთ; ეკოტურიზმი ტურინდუსტრიის ცალკე, დამოუკიდებელი საკმაოდ მსხვილი ნაწილია, რომელიც სწრაფი ტემპით ვითარდება.

რაც შეეხება ეთნოტურიზმს - ჩვენი აზრით მისი სოფლის ტურიზმის შემადგენლობაში მისი განხილვა მთლად კორექტული არ იქნება, რადგან ეთნოტურიზმი დამოუკიდებლად, ძალიან კარგი ტემპებით ვითარდება და მისი სოფლის ტურიზმთან გადაკვეთა მხოლოდ კერძო შემთხვევას შეიძლება მივაწეროთ; აგროტურიზმის