

The goal of this article is to demonstrate the value of applying the constitutional principle of direct application of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, the Convention) by Russian courts in order to remedy human rights violations at the national level, before and instead of submitting an application to the European Court of Human Rights (hereinafter, the ECHR). The methods for using this international legal instrument are demonstrated through success stories. Moreover, this article analyses organisational issues and misunderstandings, which affected legal practice and thereby prevented the effective application of the Convention at the national level.

Why victims need the Convention and the ECHR case-law

14 years after the ratification of the Convention more than 150,000 applications are pending before the ECHR, and 42,000 (27%) of such applications come from Russia. 95–98% of these applications will be declared inadmissible. The rest will be examined after 5–10 years. Can an applicant afford to wait for justice to be done for so long with a 2 to 5% of chance of success? The ECHR is an effective instrument when it comes to structural violations, but ineffective in the situation of separate common violations.

Direct application of the Convention is an additional remedy rarely used by parties to disputes in Russia. It is not necessary to invoke arguments based on the Convention before national courts to secure an ability to apply to the ECHR, but such arguments could be used as an additional tool to convince a judge. Moreover, state parties to the ECHR must be given an opportunity to identify and remedy the violation at the national level, which could be achieved by explaining ECHR standards. Moreover, such explanations could also serve to educate judges and the opposite party (usually representatives of government bodies) regarding the Convention. To date, however, graduates of law schools in Russia do not have any obligatory course on the Convention.

The value of direct application of the European Convention on Human Rights is not that such application provides more guarantees than Russian legislation. Law-application practice, though, is the major source of violation of the Convention. The application of domestic law must be in compliance with an understanding of the scope of human rights guarantees

HOW TO IMPLEMENT GUARANTEES OF THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS IN RUSSIAN COURTS

(annotation)



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in the Convention, as set forth in the case-law of the ECHR.

Under Article 1 of the Convention, a state is obliged to secure human rights of physical and legal persons in its national legal system. The ECHR cannot cancel domestic decisions, legislation or orders to do something but may consider particular violations of the Convention and award compensation (pilot judgments are an exception).

The major «burden» to provide a remedy for violations is on national courts — they are required to take into account the guarantees of the Convention as interpreted by the ECHR in its case-law. Often, it is faster and more effective to defend rights in national courts than before the ECHR. Before sealing the envelope addressed to the Strasbourg Court, one needs to do utmost to defend his/her/its «European» rights in Russian courts.

Judgments of the ECHR contain conclusions on particular cases but also

analyses of different types of violations and lacunas in legislation. There is, however, no need to draw the attention of the state to a particular violation «via Strasbourg». This could be achieved via applications to national courts, and, in Russia, this is increasingly being done with the help of parties.

Domestic application (or the lack thereof) of the Convention could also be used in preparation of an application to the ECHR after domestic remedies had been exhausted. The ECHR application will be more compelling and substantiated if one can demonstrate that the national courts ignored ECHR case-law.

How to apply the Convention in Russian courts

Due to the autonomous meaning of provisions of the Convention, the true substance of the Convention could be determined though the ECHR case-law. The Convention is what ECHR judges say about the Convention. This is contained in the Convention as well as in Russian legislation and reflected in the practice of the Russian high courts.

Under Article 15 (4) of the Russian Constitution, the Convention is part of the Russian legal system and has priority status in application compared with national legislation. Article 1 of the Federal Law «On Ratification of the Convention and its Protocols» recognises as binding

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the jurisdiction of the ECHR in interpretation and application of the Convention. Article 3 of the Federal Constitutional Law «On Judicial System» states that «Russian courts are obliged to apply international treaties ratified by Russia». The latest piece of legislation on this matter is Federal Law of 30 April 2010 «On Compensation to Citizens for Violation of the Right to a Fair Trial within a Reasonable Time». Under Article 2(2) of that law compensation for the delay in consideration of a case or in the execution of a judicial act is determined *inter alia* by taking into account principles of reasonableness, justice and the case-law of the ECHR.

The highest courts of the state issue binding explanations regarding the application of the Convention. For example, the Russian Supreme Court in its Regulation No. 5 of 10 October 2003 «On the Application by Courts of General Jurisdiction of the Universally-Recognised Principles and Norms of International Law and the International Treaties of the Russian Federation» stressed that in order to avoid any violations of the Convention, the Convention must be understood by taking into account the case-law of the ECHR.

Similarly, the Constitutional Court's judgment of 5 February 2007 No. 2-P recognises that the Convention as well as judgments of the ECHR form part of the Russian legal system and thus must be taken into account by the federal legislature and by law-application bodies.

It is, however, important to convey in oral and written form to a judge that the Convention guarantees are applicable. One might say that in Russia, litigators must teach judges the rule that ECHR judgments must be taken into account by following this rule themselves by applying the Convention and the ECHR case-law. Indeed, the Convention is increasingly being applied by judges who face parties' arguments based on the Convention.

Barriers for Application of the Convention in Russian Courts

The article then identifies several key barriers to the correct application of the Convention in Russian Courts. First, the Convention is applied without reference to the case-law of the ECHR; second, there exists a misunderstanding that the Convention does not protect legal entity and that it does not provide additional guarantees compared to domestic law; and third, the lack of «officially approved» translations of the ECHR judgments.

Conclusion

The Convention is for the protection of rights at the national level in the first place and only then before the ECHR. As a tool for protection of fundamental rights, litigating violations of the Convention before national courts is often more speedy and effective than litigating the same at the ECHR.

The Convention provides additional guarantees particularly as regards judicial and law-application practice, the scope of which is only fully determined by incorporating judgments of the ECHR. Indeed, Russian legislation and judicial practice provide legal framework for domestic direct application of the Convention as it is understood in the ECHR case-law. Thus, litigators possess all the necessary tools and methods for overcoming the artificially created barriers for direct application of the Convention in Russia.

Hence, the Convention should not just be used as additional tool of human rights protection in particular cases. Conventional arguments regularly raised before domestic courts educate judges regarding the proper application of ratified international treaties on guarantees of human rights in Russia. This is of utmost importance given the lack of special law school education on the Convention.