

AUTONOMOUS INTERPRETATION BY THE EUROPEAN COURT OF HUMAN RIGHTS AND MARGIN OF APPRECIATION

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Summary: The article is devoted to the problem of interpretation and application in practice of the European human rights standards through autonomous interpretation, as well as to the definition of the role and significance of the doctrine of margin of appreciation in this process. The relevance of the subject matter of research is due to the need to implement effective mechanisms for ensuring and protecting key human rights and freedoms in Ukraine, the establishment of the European principles of law and the European identity. The purpose of the study is a comprehensive analysis of the formation and evolution of the doctrine of autonomous interpretation in the jurisprudence of the European Court of Human Rights by studying and synthesizing judicial practice on the application of autonomous interpretation and elaboration on this basis of a system of autonomous concepts that reflect the common European vision of fundamental human rights and are also a kind of foundation of the European human rights law. The methodological basis of the paper are philosophical, general scientific and special research methods, in particular, dialectical, historical, logical, systemic, sociological, and comparative methods. The study concludes that it is through autonomous interpretation based on the European consensus that the European Court of Human Rights establishes imperative standards for the interpretation and application of human rights in practice, which prevents certain violations by particular member states of the Council of Europe, as well as supports the convergence and harmonization of different national legal systems, which contributes to the formation of the most homogeneous legal environment and the European system of human rights protection. The practical feasibility of the study is aimed primarily at applying autonomous concepts in practice, *prima facie*, by the judiciary.

Keywords: principle of subsidiarity, margin of appreciation, autonomous interpretation, autonomous concepts, European consensus, European human rights standards.

1 Introduction

The purpose of the study was defined as comprehensive analysis of the origin and development of the doctrine of autonomous interpretation in the practice of the ECtHR, as a result of which basic autonomous concepts are formed, as well as the definition and characteristics of its interaction with the doctrine of the margin of appreciation. To achieve this goal during the research, the philosophical (dialectical), general scientific (historical, logical, systemic), and special methods (sociological, comparative) were used. In particular, the historical method was applied to analyze the origin and development of the doctrine of autonomous interpretation by the ECtHR. The logical method contributed to the identification of specific autonomous concepts (e.g., criminal charge, rule of law, the law, private life, family, home, *etc.*) in the case law of the ECtHR. The sociological method, and also the methods of analysis and synthesis as key means of philosophical method, as well as the generalization in the process of examination of judicial practice on the interpretation and application of human rights standards, were used.

For the formulation of autonomous concepts, it is necessary to analyze the legislation and judicial practice of particular Member States of the Council of Europe. After all, it is through the analysis of common features of different legal systems that a common standard can be derived, an autonomous concept can be formed. Therefore, at the initial stage of the investigation, as a rule, the comparative method, sociological, and the method of analysis are used. Further, with the help of the synthesis method, the ECtHR gradually ascertains the presence and/or absence of the so-called European consensus on a particular issue and, thus, establishes a generally binding approach to the interpretation and application of a certain standard in order to effectively protect basic human rights and fundamental freedoms guaranteed by the ECHR.

Thus, using the logical, dialectical, systemic and comparative methods, a system of autonomous concepts, which is the foundation of the common European system for the protection of human rights, was defined.

When studying the role and significance of the doctrine of margin of appreciation in the process of autonomous interpretation, *inter alia*, to establish its scope (wider or narrower), as well as the main factors that affect its determination, a logical method, namely, deduction and induction, analogical reasoning, the principle of the excluded middle, was used.

The comparative method was applied to analyze legal doctrine, various scientific approaches to the definition of the content and the features of the autonomous interpretation, its critical analysis. On the basis of the systemic and logical methods, the essence and place of the doctrine of margin of appreciation in the

process of autonomous interpretation by the ECtHR was determined. Dialectical method contributed to the establishment of correlation between autonomous interpretation and certain margins of free discretion of the state, an assessment of the influence of the European consensus on the formation of autonomous concepts, as well as the dynamic interpretation of human rights, the progress of science, morality, religion, society, and, as a consequence, law, was made.

The main goal of a democratic state governed by the rule of law is the effective provision and protection of human rights. Ukraine, as a member of the Council of Europe, has undertaken obligations to implement European standards of basic human rights and fundamental freedoms. In this regard, the study and search for the most optimal mechanisms for the implementation of these standards in practice has not only general theoretical, but, above all, practical significance in the context of the European legal integration and harmonization of legislation and law enforcement practice of Ukraine with the European law. Nowadays, especially in the context of the COVID-19 pandemic, as well as in the conditions of the development of artificial intelligence, the progress of science, medicine and modern technologies, the world community and Europe, in particular, face many challenges, the most important of which is to maintain and guarantee an effective human rights protection system that is in jeopardy. That is why, the study of the interpretation and application in practice of the European human rights standards developed by the European Court of Human Rights (hereinafter – ECtHR) by means of autonomous interpretation and the doctrine of the margin of appreciation, is undoubtedly relevant and urgent. This study will contribute to the unification of the Ukrainian system of human rights protection with the European one, foremost, in the context of a common understanding (convergence of legal doctrines) and the development of common approaches to the interpretation and application of law (convergence of the practices of application of law).

Some issues of autonomous interpretation and the doctrine of the margin of appreciation in the jurisprudence of the ECtHR at different times were studied by such scholars as H. C. Yorrow, R. S. J. Macdonald,¹ F. Matscher, Y. Arai, S. Greer, G. Letsas, M. Marochini,² J. McBride, M. Lugato, G. Itzcovich, K. Dzehtsiarou, *et al.*

Certain aspects of this problem were also studied in their works by such Ukrainian scientists as O. V. Zadorozhnii, O. V. Butkevych, P. M. Rabinovich,³

- 1 MACDONALD, Ronald Saint John, MATSCHER, Franz (eds). *The European system for the protection of human rights*. Dordrecht; Boston: Nijhoff, 1993.
- 2 MAROCHINI, Maša. The interpretation of the European Convention on Human Rights. *Zbornik radova Pravnog fakulteta u Splitu*, 2014, vol. 51, no. 1, pp. 63–84.
- 3 RABINOVYCH, Petro. The rule of law in the interpretation of the Strasbourg Court and the Constitutional Court of Ukraine. *Bulletin of the Constitutional Court of Ukraine*, 2006, no. 1, pp. 37–46.

S. V. Shevchuk, S. E. Fedyk, L. A. Tsvigun, H. O. Khrystova, O. R. Dashkovska,⁴ and others.

Despite this, the study of the subject is not given adequate attention in Ukrainian science, while the research is predominantly fragmentary. There are also different points of view on the understanding of autonomous concepts in the international scientific community. That is why the purpose of this article is a comprehensive and deeper analysis of the origin and evolution of the doctrine of autonomous interpretation and the autonomous concepts, through the study and consolidation of the case law of the ECtHR, analysis of the European legal doctrine, as well as the establishment and research of the relationship between autonomous interpretation and the margin of appreciation of the state, as the most important instruments for the effective protection of human rights in Europe, which have been developed in the practice of the ECtHR, and which are the foundation of the system of the European human rights law.

Human rights are protected at the national and international levels. In this context, it is the principle of subsidiarity that plays a key role in the allocation of the powers among the local, national and international legal orders. Subsidiarity requires that the tasks, which can be performed more effectively at the national level remain in the exclusive sphere of the competence of national authorities, while functions that can be better performed at a higher level are performed at the international, *inter alia*, at the European level.

Only where national authorities fail are the international authorities called upon to subsidize them. ‘Subsidize them’ means to assist them to reach an autonomous capacity to provide for human rights protection at the level that has been internationally agreed. It also means to substitute for national authorities in extreme cases, where protection is altogether failing.⁵

It should be emphasized that states themselves determine the legal framework and the procedure for the effective enforcement and protection of human rights within their own jurisdiction. Accordingly, national authorities enjoy a certain level of discretion in this area. However, the scope of the margin of appreciation of the state in each specific case depends on many factors.

Howard Charles Yourow points out that the ECtHR employs in its practice different methods of interpretation of the European Convention on Human Rights (hereinafter – ECHR), *inter alia*, textual, autonomous, teleological, evolutive (dynamic), and historic.⁶ At the same time, the scientist determines that the

4 DAVYDOVA, Nataliya, DASHKOVSKA, Olena, MENDZHUL, Marija, YAVOR, Olga, KHOKHLOVA, Tetiana. The Right To Respect For Family Life: Legal Basis For State Interference. *Revista San Gregorio*, 2021, vol. 1, no. 44, pp. 1–8.

5 LUGATO, Monica. The Margin of Appreciation and Freedom of Religion: Between Treaty Interpretation and Subsidiarity. *Journal of Catholic Legal Studies*, 2013, vol. 52:49, no. 1, p. 67.

6 YOUROW, Howard Charles. *The Margin of Appreciation Doctrine in the Dynamics of the European Court of Human Rights Jurisprudence*. London, New York, The Hague: Martinus

autonomous method of interpretation provides that “the international review machinery must look to the ‘law of the Convention’ – including all of its sources – in order to judge state action in terms of the Convention rather than in terms of the law of the defendant state itself”.⁷ Herewith, the autonomous method is a ‘special rule’ designed by and for the Strasbourg system.⁸

2 The essence of autonomous concepts and the margin of appreciation

For the first time the doctrine of autonomous interpretation was elaborated and mentioned by the ECtHR in the case of *Engel and Others v. the Netherlands*⁹ in 1976. The case was considered in the context of the ‘right to a fair trial’, which is guaranteed by Article 6 of the ECHR, and concerned the relationship between a disciplinary offense and a criminal offense. In the context of Art. 6 this distinction is critical. Thus, the ECtHR ruled that the concepts ‘criminal charge’ and ‘civil rights and obligations’ should be interpreted autonomously. In particular, the ECtHR emphasized:

81. [...] The Convention without any doubt allows the States, in the performance of their function as guardians of the public interest, to maintain or establish a distinction between criminal law and disciplinary law, and to draw the dividing line, but only subject to certain conditions. [...] If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a ‘mixed’ offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 (art. 6, art. 7) would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction, under Article 6 (art. 6) and even without reference to Articles 17 and 18 (art. 17, art. 18), to satisfy itself that the disciplinary does not improperly encroach upon the criminal.¹⁰

Therefore, “the classification in national law has only relative value and constitutes no more than a starting-point”.¹¹

Nijhoff Publishers, Kluwer Press, 1996, p. 185.

7 Id.

8 Id.

9 *Engel and Others v. the Netherlands*. ECtHR. Judgment of 08 June 1976. Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72. Para. 81. [online]. Available at: <<http://hudoc.echr.coe.int/eng?i=001-57479>> Accessed: 10.06.2022.

10 Id.

11 *Chassagnou and Others v. France*. ECtHR. Judgment of 29 April 1999. Application no. 25088/94; 28331/95; 28443/95. Para. 100. [online]. Available at: <<http://hudoc.echr.coe.int/eng?i=001-58288>> Accessed: 10.06.2022.

At the moment, the ECtHR has developed in its case law such autonomous concepts as criminal charge,¹² civil rights and obligations,¹³ possession,¹⁴ the law,¹⁵ lawful detention,¹⁶ penalty,¹⁷ rule of law,¹⁸ association,¹⁹ peaceful assembly,²⁰ persons of unsound mind,²¹ private life,²² family,²³ home,²⁴ civil service,²⁵ etc.

- 12 *Engel and Others v. the Netherlands*. ECtHR. Judgement of 08 June 1976. Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72. Para. 81.
- 13 *König v. Germany*. ECtHR. Judgment of 28 June 1978. Application no. 6232/73. [online]. Available at: <<http://hudoc.echr.coe.int/eng?i=001-57512>> Accessed: 10.06.2022.
- 14 *Gasus Dosier- und Fördertechnik GmbH v. The Netherlands*. ECtHR. Judgment of 23 February 1995. Application no. 15375/89. [online]. Available at: <<http://hudoc.echr.coe.int/eng?i=001-57918>> Accessed: 10.06.2022.
- 15 *Sunday Times v. the United Kingdom (No. 1)*. ECtHR. Judgment of 26 April 1979. Application no. 6538/74. [online]. Available at: <<http://hudoc.echr.coe.int/eng?i=001-57584>> Accessed: 10.06.2022.
- 16 *Eriksen v. Norway*. ECtHR. Judgment of 27 May 1997. Application no. 17391/90. [online]. Available at: <<http://hudoc.echr.coe.int/eng?i=001-58036>> Accessed: 10.06.2022.
- 17 *Welch v. the United Kingdom*. ECtHR. Judgment of 09 February 1995. Application no. 17440/90. [online]. Available at: <<http://hudoc.echr.coe.int/eng?i=001-57927>> Accessed: 10.06.2022.
- 18 *Golder v. the United Kingdom*. ECtHR. Judgment of 21 February 1975. Application no. 4451/70. [online]. Available at: <<http://hudoc.echr.coe.int/eng?i=001-57496>> Accessed: 10.06.2022; See also *Silver and Others v. the United Kingdom*. ECtHR. Judgment of 25 March 1983. Application no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75. Para. 88, 89, 90. [online]. Available at: <<http://hudoc.echr.coe.int/eng?i=001-57577>> Accessed: 10.06.2022.
- 19 *Djavit An v. Turkey*. ECtHR. Judgment of 09 July 2003. Application no. 20652/92. [online]. Available at: <<http://hudoc.echr.coe.int/eng?i=001-60953>> Accessed: 10.06.2022.
- 20 *Kudrevičius and Others v. Lithuania*. ECtHR. Judgment of 15 October 2015. Application no. 37553/05. [online]. Available at: <<http://hudoc.echr.coe.int/eng?i=001-158200>> Accessed: 10.06.2022; See also *Navalnyy v. Russia*. ECtHR. Judgment of 15 November 2018. Application no. 29580/12. [online]. Available at: <<http://hudoc.echr.coe.int/eng?i=001-187605>> Accessed: 10.06.2022.
- 21 *Glien v. Germany*. ECtHR. Judgment of 28 November 2013. Final Judgement of 28 February 2014. Application no. 7345/012. [online]. Available at: <<http://hudoc.echr.coe.int/eng?i=001-138580>> Accessed: 10.06.2022; See also *Ilseher v. Germany*. ECtHR. Judgment of 04 December 2018. Application no. 10211/12 and 27505/14. [online]. Available at: <<http://hudoc.echr.coe.int/eng?i=001-187540>> Accessed: 10.06.2022.
- 22 *A, B and C v. Ireland*. ECtHR. Judgment of 16 December 2010. Application no. 25579/05. [online]. Available at: <<http://hudoc.echr.coe.int/eng?i=001-102332>> Accessed: 10.06.2022; See also *National Federation of Sportspersons' Associations and Unions (FNASS) and Others v. France*. ECtHR. Judgment of 18 April 2018. Application no. 48151/11 and 77769/13. [online]. Available at: <<http://hudoc.echr.coe.int/eng?i=001-180442>> Accessed: 10.06.2022.
- 23 *X, Y and Z v. the United Kingdom*. ECtHR. Judgment of 22 April 1997. Application no. 21830/93. [online]. Available at: <<http://hudoc.echr.coe.int/eng?i=001-58032>> Accessed: 10.06.2022; See also *Strand Lobben and Others v. Norway*. ECtHR. Judgment of 10 September 2019. Application no. 37283/13. [online]. Available at: <<http://hudoc.echr.coe.int/eng?i=001-195909>> Accessed: 10.06.2022.
- 24 *Prokopovich v. Russia*. ECtHR. Judgment of 18 November 2004. Final Judgement of 18 February 2005. Application no. 58255/00. [online]. Available at: <<http://hudoc.echr.coe.int/eng?i=001-67538>> Accessed: 10.06.2022.
- 25 *Pellegrin v. France*. ECtHR. Judgment of 08 December 1999. Application no. 28541/95. [online]. Available at: <<http://hudoc.echr.coe.int/eng?i=001-58402>> Accessed: 10.06.2022.

Thus, the principle of autonomous interpretation claims that some of the Convention's key notions should be defined authoritatively by the ECtHR independently of their understanding by member states. This method of interpretation significantly restricts the discretion of the defendant state²⁶ and "prevent contracting states from circumventing the Convention guarantees".²⁷ However, as points out Steven Greer, it is constrained by the principle of commonality, which appears in four different forms in the ECHR.²⁸ The first one – it is the 'unity principle', which is enshrined in the Preamble and states that "the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms".²⁹ The second – is the 'common understanding' principle, which maintains that fundamental freedoms are best secured through a 'common understanding and observance' of human rights. The third one – is the 'common heritage principle', which affirms that the ECHR derives from the "common heritage of political traditions, ideals, freedom and the rule of law"³⁰ of the European countries. And, the fourth – is the 'principle of evolutive or dynamic interpretation' that allows the ECtHR to abandon outdated concepts of the initial understanding of terms, as evidenced, for instance, in the preparatory materials, and thereby endorse significant and lasting changes in public opinion in Europe. However, since different manifestations of the commonality principle, even when combined, cannot justify strong uniformity, they still leave uncertain room for national differences in the interpretation of obligations under the ECHR.³¹

By adjusting the width of the margin of appreciation on a case-by-case basis, the ECtHR can negotiate between conflicting supranational and national interests and thus seeks to gain greater recognition of its decisions and "to increase the degree of authoritativeness and effectiveness of its jurisdiction".³² Assuming that the doctrine of the margin of appreciation will continue its place in the Strasbourg system, judges must "wrestle not only with the scope of the margin doctrine", but also with the coral issue of their "mission to provide an auto-

26 GREER, Steven C. *The margin of appreciation: interpretation and discretion under the European Convention on Human Rights*. Strasbourg: Council of Europe Publishing, 2000, p. 18–19.

27 LETSAS, George. The Truth in Autonomous Concepts: How to Interpret the ECHR? *European Journal of International Law*, 2004, vol. 15, no. 2, p. 282. <https://doi.org/10.1093/ejil/15.2.279>

28 GREER, Steven C., 2000, p. 19.

29 European Convention on Human Rights of 4 November 1950 (as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13). European Court of Human Rights, Council of Europe, 62 p. [online]. Available at: <https://www.echr.coe.int/documents/convention_eng.pdf> Accessed: 10.06.2022.

30 GREER, Steven C., 2000, p. 19.

31 Id.

32 ITZCOVICH, Giulio. One, None and One Hundred Thousand Margins of Appreciations: The Lautsi Case. *Human Rights Law Review*, 2013, vol. 13, Issue 2, p. 295. <https://doi.org/10.1093/hrlr/ngs038>

mous interpretation of the Convention, giving European dimension to its text above and beyond” that devised in accordance with the particular consensus in the legislation and practice of the member states of the Council of Europe, limited to specific cases.³³ It is ‘the nagging question’ as to whether the ECtHR accepts or avoids its enormous potential to provide active leadership in the field of human rights in Europe, despite the principle of subsidiarity and regardless of outcomes in individual cases.³⁴

This is the question underlying the majority and dissenting opinions in the *Sunday Times*, *Sporrong and Lönnroth*, as well as the *Markt intern*, all cases decided by razor-thin margins of the Court’s plenary session discussing the use and interpretation of the doctrine of the margin of appreciation. “It cuts across the interpretations of particular articles or categories of Articles. It is a major concern for all participants in, and constituents of, the Convention system.”³⁵

Howard Charles Yourow points out that

if the margin doctrine is to remain entrenched in the jurisprudence, then calls for autonomous interpretation must be accommodated, unless greater forces at work within and outside of the Convention system dictate the triumph of one mode over another. More likely, based on its thirty-plus year cautiously, retaining the margin doctrine, pinning it to the security of the consensus principle, and reserving unhesitatingly autonomous interpretation.³⁶

George Letsas argues that all concepts in the ECHR are autonomous in two senses. First, due to the lack of uniform linguistic criteria for determining the meaning of different concepts; and, secondly, in the sense that the correct meaning of these concepts in the understanding of the ECtHR may radically deviate from the ways of their perception, interpretation, as well, as classification within the national legal order.³⁷ It should be noted that “domestic law classification is relevant but not decisive for the meaning of the concepts of the Convention.”³⁸ Hence, the autonomous concepts are ‘*semantically independent*’ (emphasis added). It means that their meaning is not equated and may differ from the meaning that they have in the domestic legal order.³⁹ The scholar believes that judges should elaborate substantive theories aimed at “capturing the nature or purpose of the right involved and of the ECHR more generally.”⁴⁰ He calls on academics

33 YOUROW, Howard Charles, 1996, p. 196.

34 *Id.*

35 *Id.*

36 *Id.*

37 LETSAS, George. The Truth in Autonomous Concepts: How to Interpret the ECHR? *European Journal of International Law*, 2004, vol. 15, no. 2, p. 279.

38 *Id.* P. 282.

39 *Id.*

40 *Id.* P. 279

and judges to stop threatening the discretionary powers of judges and to develop general theories of adjudication for the ECtHR.⁴¹

3 The influence of consensus on the formation of autonomous concepts

Some scholars believe that the ECtHR applies autonomous interpretations in cases where there is no European consensus on certain concepts.⁴² However, we believe that it is the consensus that is the basis, common ground for the formation of an autonomous interpretation by the ECtHR, since it is the most striking indicator of a common perception of certain concepts and the formation of the European human rights standards. It is the consensus that states certain trends and common points of contact based on the analysis of the legislation of the Member States of the Council of Europe. And it is the consensus that underlies and somehow “justifies” the autonomous interpretation, inasmuch as the ECtHR does not shape this interpretation from scratch, it cannot create any new understanding that is not in the legislation and jurisprudence of any European country. Yes, at a certain moment the ECtHR may be more daring and take upon itself the right to support, give preference to one or another interpretation, thus setting a general standard. Sometimes it develops certain concepts or even changes its position, if time and society require it, but in any case, the ECtHR does not create the content of these concepts out of thin air. This is very important to understand. In fact, the so-called pan-European consensus is the source of the ECtHR’s autonomous interpretation. Of course, the role of the ECtHR is enormous, as it seeks to consolidate various approaches to understanding certain concepts, compare them and derive a general rule, a common European standard for effective protection of human rights and freedoms. At the same time, while doing this, the ECtHR only reflects objective law and tries to put into it the meaning that is most adequate in the modern conditions of the development of society.

Accordingly, based on the analysis of the ECtHR practice and following the presented logic, in the absence of consensus, the ECtHR grants wider margin of appreciation to the state, and *vice versa*. It is on the basis of the existence of the consensus that the ECtHR significantly narrows the margins of free discretion of national authorities and forms autonomous concepts.

Hence, judge Matscher in his separate opinion in the *König v. Germany* case, underlined:

In my view, autonomous interpretation means, above all, that the provisions of international conventions must not be interpreted solely by reference to the meaning and scope which they possess in the domes-

41 Id.

42 DZEHTSIAROU, Kanstantsin. Does consensus matter? Legitimacy of European consensus in the case law of the European Court of Human Rights. *Public Law*, 2011, vol. 534, P. 539.

tic law of the contracting State concerned, but that reference must be made, 'first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems' (judgment of the Court of Justice of the European Communities, 14 October 1976, (Reports) 1976, p. 1552). Putting it differently, one must look for the 'common denominator' behind the provisions in question, since it is legitimate to suppose – in the absence of any legal definition in the Convention itself – that such is the meaning which the Contracting States wished these provisions to have. This 'common denominator' can be found through a comparative analysis of the domestic law of the Contracting States. This being so, the result of such an investigation can never be a concept which is totally at variance with the legal systems of the State concerned.⁴³

We can conclude that such a 'common denominator' in the context of autonomous interpretation is consensus. George Letsas believes that "the introduction of this standard echoes a requirement of consensus: in constructing the meaning of the ECHR concepts, the ECtHR must seek to respect and accommodate a certain convergence on meaning among the various contracting states".⁴⁴ Therefore, the ECtHR "partly departs from a minority classification only to meet the standards of majority classification".⁴⁵ At the same time, the scholar also emphasizes: "In a significant number of cases the Court's intuitions have moved away from consensus towards the moral truth of the protected rights".⁴⁶ He draws a parallel between the 'substantive truth of the right' and 'evolutive' interpretation by the ECtHR.⁴⁷ Thus, for the effective protection of human rights, he puts in the first place not a formal consensus, but the content, a '*moral reading*' of the ECHR, which is achieved through a dynamic interpretation and the so-called 'hypothetical consensus'.⁴⁸

Yutaka Arai points out that the definition of 'autonomous' meaning of the concepts of the ECHR is of a great importance. Moreover, the scientist stresses that "rather than adopting the 'minimalist' approach, which is based on the lowest common denominator of law and practice of the Member States, the Strasbourg organs should interpret the Convention in a way which better serves the protection of an individual's right".⁴⁹ He characterizes the ECHR as a 'law-mak-

43 *König v. Germany*. ECtHR. Judgment of 28 June 1978. Application no. 6232/73.

44 LETSAS, George. The Truth in Autonomous Concepts: How to Interpret the ECHR? *European Journal of International Law*, 2004, vol. 15, no. 2, P. 295.

45 Id. P. 296.

46 Id. P. 297.

47 Id. P. 298.

48 Id. P. 302.

49 ARAI, Yutaka. The Margin of Appreciation Doctrine in the Jurisprudence of Article 8 of the European Convention on Human Rights. *Netherlands Quarterly of Human Rights*, 1998, vol. 16, Issue 1, p. 61. doi: 10.1177/092405199801600104

ing treaty' and emphasizes that despite a certain discretion of states, it is necessary to constantly take into account the trends developing in the Member States for the broader protection of the rights of the individual. A rigorous assessment of proportionality, using affirmative interpretative methods such as comparative and evolutive interpretation, is essential for achieving the uniform European standards.⁵⁰ The principle of autonomous interpretation is a tool by which the ECtHR can define certain key terms of the ECHR and thus prevent states from reconsidering their way of fulfilling the obligations, for instance, by preventing the redefinition of crimes as simply 'administrative offenses'.⁵¹

4 Conclusions

The doctrine of autonomous interpretation of Convention human rights is derived from the principle of subsidiarity, which essentially justifies the application of an autonomous method and the development on its basis of autonomous concepts of the ECHR, which is a guarantee for effective protection of basic human rights and fundamental freedoms at the international (the European) level. Autonomous concepts create a relatively independent, objectively formed, supranational unified pan-European system for the protection of rights, which prevents the abuse of power by individual Member States of the Council of Europe, and is an additional means of legal protection of human rights.

The principle of autonomous interpretation states that certain key concepts of the ECHR must be defined by the ECtHR, regardless of their understanding by national authorities. This method of interpretation significantly limits the margin of appreciation of the state.

In the course of the study, a relationship between the evolution of autonomous interpretation (autonomous concepts) and the margin of appreciation (free discretion) of the state was established. In particular, the development of autonomous concepts is influenced by the scope of the margin of appreciation, which is provided by the ECtHR. It depends on the specific type of human rights, as well as on many other factors, among which, the most important is the presence and/or absence of the so-called European consensus on a particular issue under consideration. Respectively, if there is no consensus on the issues at stake, the ECtHR grants a broader margin of appreciation to the state. The existence of the European consensus significantly narrows the margin of appreciation of domestic authorities. Thus, it is precisely the presence of a consensus on a specific issue that is the foundation for the formation of autonomous concepts by the ECtHR. In this context, consensus is a necessary precondition for the formation of autonomous concepts.

⁵⁰ Id.

⁵¹ GREER, Steven. The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation? *UCL Human Rights Review*, 2010, vol. 3, p. 6.

It was also established that the method of dynamic interpretation significantly affects the progress of autonomous concepts, since it allows the ECtHR to abandon outdated concepts of the initial understanding of the terms caused by changes in public opinion in Europe. Therefore, the autonomous interpretation, in turn, reflects the common European consistent patterns and trends in the development of law in a certain sense.

To date the ECtHR has elaborated in its jurisprudence such autonomous concepts, as criminal charge, penalty, lawful detention, civil rights and obligations, possession, civil service, the law, rule of law, association, peaceful assembly, private life, family, home, persons of unsound mind, *et al.*

Despite the fact that the autonomous method was developed in the practice of the ECtHR, and autonomous concepts are formulated exclusively by the ECtHR, that is, they are its prerogative, we are convinced that the Constitutional Court of Ukraine, as well as the Supreme Court in the process of law enforcement, including generalization of judicial practice, through the interpretation of the Constitution and national legislation, *de facto* form autonomous concepts within the national legal system of Ukraine. In this sense, the role of the constitutional court is of particular importance, since it is the core subject in the formation of the national legal doctrine and provides the foundation for a homogeneous legal environment in the processes of implementation, application of law, as well as in the protection of subjective rights. In this context, the principles, methods of operation and the role of the Constitutional Court of Ukraine and the ECtHR have much in common.

Hence, we suppose that this research will contribute to the judiciary, *prima facie*, to the higher courts, in developing a general theory of adjudication and will improve their efficiency.

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