Judicial Activism in the Approach of the European Court of Human Rights to Positive Obligations of the State

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1. Introduction
The most successful and effective system for the international protection of human rights remains the European human rights system. This renown has been achieved, inter alia, due to judicial activism of the European Court of Human Rights (the ‘ECtHR’ or the ‘Court’) interpreting the European Convention for the Protection of Human Rights and Fundamental Freedoms¹ (the Convention) in a dynamic manner²

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2 For the first time the Court expressly referred to the necessity to interpret the Convention in a dynamic manner in the case Tyrer v. the United Kingdom, 25 April 1978, ECHR, no. 5856/72, Series A no. 26, para. 31.
and imposing positive obligations upon the States in response to the social evolution. In pursuit of effective protection, today the Court ensures broader protection under the Convention of which it is the ultimate guardian. However, in its mission to interpret, develop, clarify and safeguard the Convention, the Court must show sufficient restraint and avoid turning into a law-maker, as it is for the member States to expand the scope of the Convention with new substantive rights by way of additional protocols. The Court is expected to act in accordance with its role within the Convention mechanism of the subsidiary nature, taking due account to the States’ margin of appreciation in choosing the means for the implementation of the undertakings under the Convention, which in case of positive obligations might be quite wide.

The Contracting States agreed that the Convention’s goals would be best maintained by a common understanding and observance of human rights; therefore the Court in its case-law establishes the European standards corresponding to the common values among the member States that enables both to maintain and promote the Convention rights.

3 The requirement of States’ positive obligations to take certain actions in addition to the requirement to refrain from the interference with the rights have been introduced by the Court in Case “relating to certain aspects of the laws on the use of languages in education in Belgium” v. Belgium (Belgian linguistic), 23 July 1968, ECHR, nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, Series A no.6, Law, I, B, para. 3.


5 Today there are 14 additional protocols to the Convention and some of them are exception-ally of the procedural nature or had been an integral part of the Convention such as Protocol no. 2 (ETS no. 44), while other, namely Protocols nos. 1 (ETS no. 9), 4 (ETS no. 46), 6 (ETS no. 114), 7 (ETS no. 117), 12 (ETS no. 177) and 13 (ETS no. 187), enshrine substantive rights, e.g. protection of property (Article 1 of Protocol no. 1), prohibition of collective expulsion of aliens (Article 4 of Protocol no. 4), right not to be tried or punished twice (Article 4 of Protocol no. 7), general prohibition of discrimination (Article 1 of Protocol no. 12), abolition of the death penalty (Article 1 of Protocol no. 13), etc.


7 The doctrine of margin of appreciation was invoked by the Court in its first case on the merits in respect of Article 15 (Lawless v. Ireland (no. 3), no. 332/57, Series A no. 3), subsequently the doctrine was elaborated in respect of substantive rights and in Handy-side v. the United Kingdom case (7 December 1976, ECHR, no. 5493/73, Series A no. 24) the Court conceptualised this doctrine. See generally H. Ch. Yourow, The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence (Kluwer Law International, The Hague-Boston-London, 1996).

8 See e.g. Evans v. the United Kingdom [GC], 10 April 2007, ECHR, no. 6339/05, Reports of judgment and decisions 2007-IV, para. 77.

9 Convention rights – rights and freedoms enshrined in the Convention and the additional Protocols thereto.