Bojan Spaić
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PRAVO NA OBRAZLOŽENU PRESUDU

PRAKSA EVROPSKOG SUDA ZA LJUDSKA PRAVA

CENTAR ZA DEMOKRATSKU TRANZICIJU

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AUTORI

Bojan Spaić
Docent Pravnog fakulteta
Univerziteta u Beogradu

Goran Dajović
Profesor Pravnog fakulteta
Univerziteta u Beogradu

ISTRAŽIVANJE

Miloš Marković
Slobodan Radovanović

UREDNIK

Miodrag Jovanović
Profesor Pravnog fakulteta
Univerziteta u Beogradu

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Vukašina Markovića bb
81 000 Podgorica, Crna Gora
tel: +382 20 234 522
email: cdtmn@t-com.me
www.cdtmn.org

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PREDGOVOR UREDNIKA

Iako je ova publikacija nastala kao deo rada na projektu 'Initiative for Open Judiciary', svojevrsni okidač za razmišljanje na temu prava na obrazloženu sudsku presudu bio je intervju visokog pravosudnog zvaničnika iz jedne od zemalja regiona. Na pitanje novinarke da li deo postupka vrednovanja rada sudija može biti i kontrola kvaliteta obrazloženja sudskih odluka, budući da se prigovori te vrste upućuju od strane Evropskog suda za ljudska prava, odgovor zvaničnika je bio decidno odričan. Po njegovim rečima, oni koji bi vrednovali obrazloženje presuda nužno bi „ulazili u sudsku presudu", a to je posao neposredno višeg suda. Studija koju stavljamo na uvid javnosti predstavlja potvrdu onoga u šta smo od početka intuitivno verovali, a to je da se kvalitet obrazloženja sudske presude može ocenjivati na osnovu niza „spoljašnjih" – formalno-logičkih, argumentativnih i proceduralnih – odlika, a da se time ne zalazi u meritum same odluke. Drugim rečima, ova studija pokazuje da se kvalitet sudijskog rada može ocenjivati prema jednom broju standarda o kojima svaki sudija mora da vodi računa prilikom presuđivanja i formulisanja presude da bi se ona, prema merilima prakse Evropskog suda za ljudska prava, mogla smatrati adekvatno obrazloženom.

Pravo na pravično suđenje, predviđeno članom 6 Evropske konvencije za zaštitu ljudskih prava, već dugo vremena se u našoj javnosti sagledava prvenstveno iz perspektive prava na suđenje u razumnom roku. Fokus javnosti na tom segmentu člana 6 je u potpunosti razumljiv, imajući na umu (ne)efikasnost domaćeg pravosuđa. Taj pritisak javnosti i zahtev za delotvornijim radom pravosuđa je, na kraju krajeva, doveo i do usvajanja posebnih zakonskih propisa koji se bave zaštitom prava na suđenje u razumnom roku. Negativna strana ove usredsređenosti na pomenuti aspekt člana 6 ogleda se u zanemarivanju drugih važnih segmenata prava na pravično suđenje. Naime, kao i većina prava u Konvenciji, i pomenuto pravo je po svojoj prirodi „složeno" (cluster right), što znači da se sastoji od većeg broja međusobno povezanih ovlašćenja. Jedno od njih jeste i pravo na obrazloženu sudsku presudu koje se u praksi Evropskog suda za ljudska prava razvilo u tesnoj vezi sa pravom na pravni lek i pravom na pristup sudu. Važnost valjano obrazložene sudske presude moguće je sagledati iz dve perspektive. Najpre je to moguće učiniti iz perspektive stranke o čijim pravima i obavezama se odlučuje u sudskom postupku. Pravo nezadovoljne stranke da se obrati neposredno višoj sudskoj instanci bilo bi mrtvo slovo na papiru kada presuda ne bi bila na adekvatan način obrazložena. Ta perspektiva se i najčešće ima na umu kada se razmatra pravo na obrazloženu sudsku presudu. Postoji, međutim, i druga perspektiva o kojoj se kod nas, čak i u stručnoj literaturi, mnogo manje govori. To je perspektiva najšireg javnog

mnjenja. Sposobnost sudstva da se u javnosti predstavi kao nezavisna grana vlasti (appearance of independence), u velikoj meri će zavisiti od toga da li su sudske odluke valjano obrazložene i da li su u dovoljnoj meri jasne i najširoj javnosti, na čijem poverenju, u krajnjem, i počiva autoritet sudstva. Formalnu neopozivost konačnih sudskih odluka, koja je stub vladavine prava, ne treba, u tom smislu, brkati sa legitimnim pravom javnosti da kritički polemiše sa argumentima na kojima su te odluke zasnovane.

Obe pomenute perspektive su ugrađene u praksu Evropskog suda za ljudska prava i, otuda, su u ovoj studiji pretočene u odgovarajuće standarde koje sudije treba da slede da bi im presude zadovoljile kriterijum obrazloženosti. Katalog formulisanih standarda, koji se nalazi na kraju ove studije, ne treba, međutim, tretirati kao puko „uputstvo za upotrebu", jer je postupak presuđivanja, pogotovo u najvišim sudskim instancama, lišen bilo kakvog automatizma. Stoga je za punu implementaciju pomenutih standarda neophodno da se oni sagledavaju u kontekstu prethodnih teorijskih i doktrinarnih razmatranja. Tek u svetlu tih saznanja je moguće u punom smislu razumeti prirodu i opseg prava na obrazloženu sudsku presudu kako je ono razvijeno u praksi Evropskog suda za ljudska prava.

Miodrag Jovanović
Profesor Pravnog fakulteta
Univerziteta u Beogradu

UVODNA NAPOMENA

Evropska konvencija za zaštitu ljudskih prava i osnovnih sloboda (u daljem tekstu Konvencija) koju je Savjet Evrope usvojio 1950. godine predstavlja svojevrsnu evropsku povelju o ljudskim pravima, kojom su zemlje potpisnice, samo dvije godine nakon usvajanja Opšte deklaracije o ljudskim pravima UN, prihvatile da pravima iz Deklaracije daju obavezujuću snagu, štite i unaprjeđuju ih. Međutim značaj Konvencije ne proizlazi samo iz njenog progresivnog sadržaja ili iz činjenice da je ona prvi panevropski dokument o zaštiti ljudskih prava. On se uistinu ogleda u tome da je Konvencijom ustanovljen do sada najdjelotvorniji institucionalni mehanizam kontrole njene primjene u državama koje su joj pristupile, te u prihvatanju tih država da se potčine prinudnom izvršenju obaveza koje su ratifikacijom Konvencije prihvatile. A kada se govori o njenoj djelotvornosti i institucionalnom mehanizmu kontrole njene primjene, prije svega se ima na umu da je Protokolom broj 11 koji je sastavni dio Konvencije, uspostavljen pravosudni organ, u punom njegovom kapacitetu – Evropski sud za ljudska prava u Strazburu (u daljem tekstu: Sud ili Sud u Strazburu) – koji je odgovoran za tumačenje Konvencije i za donošenje presuda protiv država ugovornica u slučaju da one krše prava i slobode koje Konvencija garantuje. Uloga Suda je, prema tom Protokolu, ojačana činjenicom da se garantuje pravo pojedincu da podnese Sudu individualnu predstavku protiv države ugovornice za koju smatra da mu je prekršila neko pravo ili slobodu koju Konvencija garantuje, i tako pred Sudom pokrene postupak protiv te države, bez obzira na njenu volju da li želi ili ne da bude strana u postupku: "Prema tome, pojedinci sada uživaju na međunarodnom nivou istinsko pravo tužbe radi ostvarivanja prava i sloboda, na šta ih Konvencija direktno ovlašćuje".[1]

Tokom višedecenijske prakse, Sud u Strazburu je uspio da se nametne kao referentna pravosudna panevropska institucija u oblasti zaštite ljudskih prava i sloboda, što znači da je taj Sud, kada se radi o primjeni odredbi Konvencije, danas najviši interpretativni autoritet za područje četrdesetsedam država, članica Savjeta Evrope, i za preko 850 miliona stanovnika tih država. S jedne strane, evolucionističkim, ekstenzivnim i teleološkim interpretativnim pristupom tekstu Konvencije, Sud je razradio a ponegdje čak i proširio korpus ljudskih prava koji Konvencija u svom izvornom obliku štiti i garantuje. S druge strane, insistirajući na principu efektivnosti i djelotvornosti odredaba Konvencije, uspio je da izazove stvarne promjene u zakonodavnoj i pravosudnoj praksi država ugovornica kada je riječ o oblasti zaštite ljudskih prava i sloboda, a ne samo da pruži pojedincima individualnu pravdu, to jest da onima kojima su povrijeđena ljudska prava garantovana Konvencijom obezbjedi zaštitu i pravičnu nadoknadu.

1) Mamatkulov and Askarov v. Turkey, 46827/99, 46951/99, § 122.

Iz svega što je dosad rečeno, jasno je koliki je značaj koji sistem zaštite ljudskih prava, uspostavljen Konvencijom, ima za svaku državu ugovornicu. U tom smislu, od posebnog značaja za svaki nacionalni pravni sistem država ugovornica jeste da se u domenu ljudskih prava praksa njegovih pravosudnih institucija što više usklađuje s praksom i autoritativnim interpretacijama koje kroz svoje presude utvrđuje Sud u Strazburu. Imajući to na umu, u priručniku koji je pred čitaocem detaljno će se izložiti sadržaj jednog prava – prava na obrazloženu presudu (right to a reasoned judgement) - koje nije izričito predviđeno tekstom Konvencije, već je uspostavljeno upravo praksom Suda i njegovim tumačenjem člana 6. Konvencije. U tekstu koji slijedi izložićemo praksu Suda, objasnićemo na koji način sâm Sud argumentuje i obrazlaže svoje presude, ali najprije i iznad svega, utvrdićemo na osnovu kojih standarda dobrog rasuđivanja, argumentovanja i obrazlaganja Sud u Strazburu cijeni sadržaj odluka nacionalnih sudova država ugovornica u predmetima u kojima može doći do povrede prava i sloboda garantovanih Konvencijom. Toj glavnoj namjeri autora publikacije upodobljen je i njen sadržaj:

U ključnom poglavlju se detaljno analiziraju presude Suda u Strazburu u kojima se Sud bavio potencijalnim kršenjem prava na obrazloženu (sudsku) odluku i izvode se odgovarajući zaključci o standardima dobrog argumentovanja i obrazlaganja koje je Sud tim presudama postepeno uspostavljao. Navedenom centralnom i najvažnijem poglavlju prethode tri kraća, uvodna i pripremna poglavlja čiji je cilj da centralno izlaganje situiraju u širi teorijski, institucionalni i interpretativni okvir i da tako doprinesu boljem razumijevanju ključne analize prakse Suda u Strazburu u vezi s pravom na obrazloženu presudu:

U prvom od tri pomenuta poglavlja, ukratko se postavlja najširi teorijski okvir unutar kojeg se kreće svaka rasprava o načinima pravnog rasuđivanja, o valjanim i nevaljanim argumentima i pojašnjava se kako unutar jedne pravničke (pravne) zajednice nastaju konvencije kojima se uspostavljaju principi prihvatljive pravne argumentacije i obrazlaganja odluka prilikom primjene prava i kako se te konvencije razlikuju u zavisnosti od toga kakva vrsta pravničke zajednice je u pitanju.

U sljedećem, drugom poglavlju se posebna pažnja posvećuje analizi opšte pozicije Suda u Strazburu u okviru sistema zaštite ljudskih prava i sloboda garantovanih Konvencijom, a naročito njegovim nadležnostima i načinom njegovog funkcionisanja. U istom poglavlju se razmatra i nekolicina najvažnijih interpretativnih principa ili argumenata kojima Sud najčešće pribjegava prilikom primjene Konvencije i koje postojano navodi u obrazloženjima sopstvenih presuda.

Najzad, u trećem poglavlju koje prethodi centralnom poglavlju o praksi obrazloženog presuđivanja, konkretnije se govori o članu 6. Konvencije koji, u cjelini gledano, garantuje pravo na pravično suđenje. Preduzima se detaljnija analiza tog člana, odnosno prava koja je Sud tokom svoje prakse "izveo" ili zasnovao na tom članu Konvencije, a među kojima je i pravo na obrazloženu presudu, o kojem se nešto više govori pri samom kraju trećeg poglavlja.

POGLAVLJE I

Opšti okviri prihvatljivog pravnog argumentovanja i obrazloženja

1. Uvod

Jedan od najvećih doprinosa rimske pravne civilizacije modernom pravu jeste u tome što se već u doba rimske kazuistike u okviru pravničke profesije destilišu neki principi prihvatljivog pravnog rasuđivanja i argumentovanja.[2] Pod tim se, prije svega, podrazumijeva sklonost rimskih pravnika, da osim logičkih ili retoričkih sredstava, u pravnim sporovima koriste i jedan skup argumenata i principa rasuđivanja, karakterističan samo za pravni diskurs. Taj doprinos se u manjoj mjeri sastoji u tome što su nas upravo rimski pravnici snabdjeli konkretnom listom principa i argumenata prihvatljivog rasuđivanja (iako je i u tome njihov doprinos značajan), a više u tome što su pokazali da takva lista argumenata (kakva god da je njen sadržaj) uvijek postoji u pravničkom staležu i da se, što je još važnije, upotrebljava u pravnoj praksi, a naročito u pravosudnoj praksi.

2) Antony Morice Honore, "Legal reasoning in Rome and Today", South African Law Journal, Vol. 91/1974, p. 92.

Prema tome, jedan od kriterijuma da li je argument koji se koristi u rješavanju nekog spornog pravnog slučaja (pred sudom recimo) dobar ili ne, zavisi od toga da li je on "prihvatljiv" kao takav u tekućem pravnom "saobraćaju", da li je on konvencionalno praktikovan među sudijama tog pravosudnog sistema prilikom pravnog rasuđivanja. Ta "prihvatljivost" jeste, dakle, opipljiva i ona se na izvjestan način pravnicima nameće kao okvir u kojem se oni moraju kretati da bi se razlozi, argumenti i opravdanja za odluke koje donose mogli uopšte uzeti u obzir kao pravni(čki) razlozi, argumenti i opravdanja.

Proces pravnog rasuđivanja kao svoj ishod ima uglavnom praktičku odluku, ali njegova svrha nije samo da se do odluke dođe, nego i da se odluka opravda i obrazloži. Budući da se odluka opravdava prije svega pravničkom "auditorijuma", jasno je da će kvalitet i vrijednost takvog opravdanja presudno zavisiti od procjene tog auditorijuma. Odluka se, prije svega, odnosi na strane u postupku, ali je potencijalni auditorijum kojem se, primjera radi, sudije obraćaju obrazloženjem svojih odluka znatno širi – osim strana u sporu, njihovih zastupnika i pripadnika pravničke struke, obrazloženje je upućeno i naučnoj, političkoj i laičkoj javnosti, a na neki način i svim državnim organima. Ipak, obrazloženje odluke je sačinjeno od pravnih argumenata – a to znači od argumenata koje pravnici upućuju pravnicima koji su najpozvaniji da ocjene njihovu (ne)logičnost, (i)racionalnost,

formalnu (ne)prihvatljivost itd. Stoga je pravnički auditorijum taj koji određuje terminologiju, kanone argumentacije i najzad sudi i o valjanosti pomenutih obrazloženja. Bez njegovog posredovanja ostaloj zainteresovanoj javnosti je teže da uvidi da li je i u kojoj mjeri pravna argumentacija u nekom slučaju valjana ili nije. Ovdje naročit značaj imaju sudovi[3] višeg stepena, čija je obaveza da ispituju valjanosti odluka nižih sudova. U tom kontekstu treba razumjeti i analizu pozicije i prakse Suda u Strazburu koja sledi, a koja će se u njenom centralnom dijelu pozabaviti upravo standardima dobrog argumentovanja i obrazlaganja sudskih odluka koje je taj Sud uspostavio.

Međutim, najprije treba naglasiti da u navedenom kontekstu termin "prihvatljiv" (argument) ne znači isto što i "ispravan" (argument). Naime, ovo drugo značenje podrazumijeva da, primjera radi, sudija, koristeći "ispravan" argument rasuđivanja uvijek i neizbježno dolazi do "ispravnog" ili tačnog odgovora na konkretno pravno (ili činjeničko) pitanje, a zapravo se to ne događa. Termin "prihvatljiv" je prikladniji jer samo postavlja granice sudijama (i pravnicima uopšte) u pravnom rasuđivanju, određujući koji su to argumenti i tehnike prihvatljivi odgovarajućem pravničkom auditorijumu u toku procesa pravničkog rasuđivanja i obrazlaganja donijetih odluka prilikom primjene prava, ne sugerišući da će njihovom primjenom svi pravnici doći do istog i jedinog ispravnog zaključka oko spornog pitanja.[4] Uprkos tome što se korišćenjem prihvatljivih argumenata u pravnom rasuđivanju i odlučivanju ne dolazi uvijek nužno do jednog jedinog ispravnog odgovora na sporno pitanje (ili pitanja), kroz dugu tradiciju pravnog rasuđivanja se takođe jasno iskristalisala ideja da korišćenje drugih (neprihvatljivih) argumenata sigurno ukazuje da je određeni odgovor na sporno pravno pitanje pogrešan. Stoga premda sistematizovanje i popisivanje prihvatljivih argumenata koje skup pravnika unutar određenog pravnog sistema koristi prilikom rasuđivanja i obrazlaganja svojih odluka ne predstavlja gotov recept za davanje jednog jedinog ispravnog odgovora na svako pravno pitanje, on ipak postavlja okvir izvan kojeg su svi odgovori na pravna pitanja unutar tog sistema nesumnjivo pogrešni.[5]

2. Teorijski okviri prihvatljive pravne argumentacije

Kako izgleda konkretno, to jest u čemu se najopštije govoreći, sastoji taj okvir "prihvatljivog" argumentovanja i obrazlaganja odluka?

Prva granica tog okvira pravnog argumentovanja svakako su pravila formalne logike, jer je to prva granica svakog racionalnog argumentovanja. I ne samo da su obično unutar izvjesnog kruga pravnih institucija neprihvatljivi iracionalni argumenti (na primjer, lične predrasude donosioca odluke, iracionalni na-

3) Osim sudova, posebno važno mjesto u procjeni izvjesnog obrasca pravnog rasuđivanja ima doktrina, to jest analize i kritike pravnika-naučnika, a ovaj tekst je primjer takve analize konkretne prakse konkretnog suda upravo povodom pitanja šta su standardi (dobro) obrazložene sudska odluke.

4) Slobodnije rečeno, kao što pridržavanje pravila gramatike jeste nužan, ali ne i dovoljan uslov dobrog stila pisanja, tako je i ostajanje u okvirima skupa prihvatljivih pravnih argumenata i principa samo nužan, ali ne i dovoljan uslov opravdanosti, zasnovanosti ili ispravnosti jedne pravne odluke.

5) John. Bell, "The Acceptability of Legal Argument", in Neil MacCormick, Peter Birks (eds.), The Legal Mind, Essays for Tony Honore, Oxford: Clarendon Press, 1986, pp. 45-66;

čini dokazivanja i zaključivanja kao što su bacanje kocke ili ispitivanje "proročice"), nego se obično smatra i da cjelokupna argumentacija i obrazloženje odluke ne smiju biti logički protivrječni, to jest da moraju da budu koherentni. O ovom "logičkom" aspektu pravnog rasuđivanja Sud u Strazburu često raspravlja u svojim odlukama koje se tiču prava na obrazloženu presudu, a o čemu će više riječi biti u četvrtom poglavlju.

Druga granica svakog pravnog argumentovanja i obrazlaganja, međutim, inherentna je tradiciji pravničkog poziva i rezultat je invencije generacija pravnika-profesionalaca i prakse pravnih institucija. Svakom obrazovanom pravniku je poznata većina argumenata s tog "popisa" koji se prenosi s generacije na generaciju i koji pravnicima omogućava da se u primjeni prava oslone na argumente koji su konvencijom unutar pravničkog auditorijuma prihvaćeni i nesporni. Uz ogradu da lista takvih argumenata nikada nije iscrpna, a da također unutar određenog pravničkog auditorijuma ili nacionalnog pravnog poretka ili unutar jedne uticajne i značajne pravne institucije (pošto je tema ovog teksta upravo jedna takva nadnacionalna pravosudna institucija) mogu da postoje i specifični kanoni argumentovanja i obrazlaganja,[6] pomenućemo da su oni kako formalni, proceduralni,[7] kao što su to sistematski, semantički, lingvistički argumenti tako i supstantivni, kao što su to teleološki ili evolucionistički argumenti. Najzad, na neki način oni mogu biti i mješoviti, kao što je to argument balansiranja (to jest, test proporcionalnosti). O nekim od ovih argumenata koje naročito koristi Sud u Strazburu biće više riječi u narednom poglavlju.

6) O tim specifičnostima, kada je riječ o Sudu u Strazburu, opširnije ćemo govoriti u narednom poglavlju.

7) U smislu da ne odražavaju neke moralne ili pravne principe.

Konačno, iz ovoga što je do sada rečeno jasno sledi da je pravno rasuđivanje (i argumentovanje) u stvari pravničko rasuđivanje. Takozvani "obrazovani" razum konkretnog pravnika jeste samo odraz, refleksija kolektivnog pravničkog razuma (koji se nekada naziva i pravnom logikom) koji predstavlja nasljeđe znanja, vještina i iskustva generacija ljudi koji su se bavili pravom. Prema tome, jasno je da su pravnici stalež, grupa ljudi koja svojom djelatnošću kreira izvjestan diskurs, kako bi se to reklo u savremenoj socijalnoj teoriji. Međutim, ovdje je umjesno jedno preciziranje, koje će biti i od koristi da se ispravno razume svrha ovog priručnika.

3. Subjekti obaveze pravne argumentacije

Na koje se to tačno vrste pravnika misli? Prvi intuitivan odgovor je da su u ovom smislu najvažniji pravnici-sudije. Naime, kada je riječ o sudijama kao subjektima pravnog rasuđivanja njihovo razumijevanje prihvatljivih argumenata i pravila pravnog rasuđivanja oblikuje njihov institucionalni položaj. S jedne strane oni raspolažu institucionalnom moći (najčešće, konstituisanom samim ustavom ili u slučaju Suda u Strazburu, Konvenci-

jom i pratećim protokolima) da svojom odlukom konkluzivno riješe svaki pravni spor. Takva njihova uloga prilikom rješavanja sporova obično podrazumijeva dva bitna elementa sudijske pozicije koji utiču na način njihovog rasuđivanja i argumentovanja: nepristrasnost u odnosu na stranke u sporu i odgovornost. Stoga je pogled sudija na proces rasuđivanja daleko najkompleksniji i najviše razrađen, a obaveza javnog obrazlaganja sopstvenih odluka dodatno podstiče odgovornost prilikom obrazloženja odluka. S druge strane, zbog njihovog uticaja na cjelokupan pravni sistem, samo sudijsko rasuđivanje uvijek je na izvjestan način stvaralačko i tvoriteljsko u odnosu na taj sistem – i o tome takođe pravosuđe mora da vodi računa kada izgrađuje sopstveni kanon prihvatljivih pravnih argumenata.

U sasvim drugačijem položaju u odnosu na sudije su pravni zastupnici različitog profila ili javni pravobranioci i tužioci, recimo. Njihova "briga" (pa i odgovornost) za uticaj vlastitog načina rasuđivanja na pravni sistem i njegovo usklađeno i nesmetano funkcionisanje je višestruko manja – čak i u slučaju javnih službenika, kao što su tužioci. Njihova prevashodna briga je strana koju u sporu zastupaju, te dobitak odnosno gubitak spora. Iz toga proizlazi da je s njihove tačke gledišta, uz rasuđivanje i argumentaciju podjednako važna i retorička "strana" pravničkog zanata.

Konačno, ukoliko cio pravni sistem, a naročito pravno rasuđivanje sagledavamo iz ugla pravne nauke, profesora ili studenata prava, u prvi plan izlazi analiza procesa rasuđivanja i argumentovanja koja se obavlja izvan svakodnevne pravne arene. Njome ne rukovode nikakve praktične potrebe, nego saznajna svrha – razumjeti pravni sistem i u okviru njega kanone prihvatljivih pravnih argumenata kao koherentan i konzistentan sistem, bez obzira čak i na određene neusklađenosti koje taj sistem "proizvodi" u svakodnevnom funkcionisanju. Takođe, u svom rasuđivanju, doktrina može i treba da bude mnogo više kritički nastrojena prema postojećoj praksi rasuđivanja, nego sudije ili pravni zastupnici, da je mjeri i procjenjuje s aspekta određenih izvanpravnih društvenih vrijednosti, kao i sa stanovišta pravde i pravičnosti.

Imajući sve to na umu, iako je definicija pravnog rasuđivanja kao rasuđivanja na osnovu važećih pravnih normi i dalje korisna, važno je da se ponekad precizira na koju od pomenutih podgrupa pravnika referiramo kada govorimo o pravnom (pravničkom) rasuđivanju. To je važno iz jednostavnog razloga što će, primjera radi, jedan prihvatljiv doktrinarni argument, iskorišćen u apstraktnoj analizi prava biti neprihvatljiv[8] ili neupotrebljiv za sudiju u rješavanju konkretnog pravnog spora.

8) U smislu da ne odražavaju neke moralne ili pravne principe.

4. Rezime poglavlja

Na kraju, da rezimiramo sadržaj ovog poglavlja u nekoliko povezanih teza. Primjena prava predstavlja jednu vrstu osobene socijalne prakse. Ta praksa je osobena jer ona, prvo, podrazumijeva da se njome bave osobene pravne institucije (recimo, sudovi[9]) i drugo, da su te institucije sačinjene od posebno obučenih profesionalaca koji kroz dugotrajnu i ustaljenu praksu primjene prava formiraju poseban način pravnog rasuđivanja i konvencije pravnog argumentovanja i obrazlaganja svojih odluka.

Stoga socijalna praksa primjene prava nije puko pravno rasuđivanje u skladu s važećim pravom, već je sačinjena i od skupa principa, argumenata, kanona tumačenja koji je profesionalni pravnički stalež autonomno razvio kroz tu praksu.

Od svih pravnika, kada govorimo o obrascima prihvatljivog pravnog argumentovanja i obrazlaganja, za svaki pravni poredak je najvažnije koje obrasce valjanog rasuđivanja razvijaju pravnici-sudije unutar pravosudnih institucija. Razlog za to je njihov institucionalni položaj koji im daje dominantno mjesto u interpretaciji i primjeni važećeg prava. Na osnovu toga, jasno je koliki značaj za svaki nacionalni pravni poredak i za primjenu prava unutar tog poretka ima teorijska i dogmatička analiza sudske prakse nacionalnih sudova u domenu pravne argumentacije i obrazlaganja.

Najzad, imajući u vidu ono što je već rečeno u uvodnoj napomeni u vezi sa značajem i institucionalnim položajem Suda u Strazburu u panevropskom sistemu zaštite ljudskih prava, jasan je i značaj analize njegove sudske prakse za svaki pravni sistem država ugovornica, barem kada je riječ o praksi primjene Konvencije i zaštiti i garantovanju ljudskih prava. Taj značaj je tim veći, što Sud u Strazburu u posljednje vreme, nakon što je ustanovio da prema članu 6. Konvencije postoji pravo na obrazloženu presudu, autoritativno postavlja svojevrsne obavezujuće minimalne standarde valjane argumentacije i obrazloženja sudskih presuda nacionalnih sudova.

9) "Institucije" u ovom smislu obuhvataju i, primjera radi, esnafska udruženja profesionalnih pravnih savjetnika ili obrazovne institucije u oblasti prava. Dakle, nije riječ samo o nacionalnim ili nadnacionalnim pravnim institucijama iako su one u centru pažnje u daljem tekstu.

POGLAVLJE II

Opšta pozicija Suda u Strazburu u sistemu zaštite ljudskih prava garantovanih Konvencijom

1. Uvod

Teško je ispravno razumjeti odluke koje Sud u Strazburu donosi u pojedinačnim sporovima podnosilaca predstavki protiv države, bez obzira da li se konkretne predstavke i odgovarajuće odluke odnose na kršenje člana 6. Konvencije, koji je predmet naše pažnje, ili na kršenje ljudskih prava garantovanih ostalim članovima Konvencije, ukoliko se ne razumije opšta pozicija Suda u sistemu zaštite ljudskih prava garantovanih Konvencijom. Kada govorimo o opštoj poziciji Suda pre svega imamo na umu njegovo (1) mjesto i funkciju u sistemu zaštite ljudskih prava uspostavljenih konvencijom, zatim (2) način rada na osnovu kojeg Sud tu funkciju ostvaruje, a koji je utvrđen Konvencijom, pratećim Protokolima kao i samom praksom Suda i najzad (3) principe na kojima zasniva svoje presude i metode tumačenja Konvencije koji su se kroz sudsku praksu Suda ustalili kao uobičajen argumentativni okvir pri donošenju njegovih odluka. Redom ćemo razmotriti svako od pomenutih pitanja, premda ćemo najveću pažnju posvetiti posljednjem od njih – pitanju metoda tumačenja i primjene Konvencije – pošto je ono i od najvećeg značaja za temu ovog priručnika.

2. Mjesto i funkcija suda

Već u samoj Preambuli Konvencije države ugovornice koje su je potpisale ističu da se ona zasniva na "zajedničkom nasljeđu političkih tradicija, ideala, slobode i vladavine prava". Budući da je jedan od nosećih stubova ideje i prakse vladavine prava, princip podjele vlasti, ne iznenađuje da se i taj princip smatra jednim od ključnih elemenata sistema zaštite ljudskih prava garantovanih Konvencijom. Međutim, što je još važnije, jedan od ključnih elemenata same podjele vlasti je nezavisno pravosuđe, tako da se taj princip, istina na specifičan način, primjenjuje i na funkcionisanje Suda u Strazburu. Prema tome, prva reč koju valja reći kada se govori o mjestu i funkciji Suda u Strazburu je riječ "nezavisnost". I premda postoje neka otvorena pitanja kada se radi o položaju Suda prema Savjetu Evrope, nije sporno da se svako miješanje, bilo evropskih, bilo nacionalnih institucija u rad Suda smatra nezamislivim a narušavanje nezavisnosti Suda nedopustivim. Štaviše, Sud u svojim odnosima prema nacionalnim institucijama država ugovornica uporno insistira na sopstvenoj nezavisnosti i putem svojim presuda kao i na druge načine "podsjeća" nacionalne vlade na obavezu da istu takvu nezavisnost treba da obezbijede i nacionalnom pravosuđu.[10]

10) Luzius Wildhaber, "The European Court of Human Rights in Action", Ritsumeikan Law Review, Vol. 21/2004, p. 89, i.d.

Međutim, ako se konkretnije govori o položaju Suda u sistemu zaštite ljudskih prava uspostavljenih Konvencijom, onda je ključno da se spomenu njegove nadležnosti. Na osnovu odredbi Konvencije i odgovarajućih Protokola može se reći da je ta nadležnost u osnovi dvojaka. Prvo, Sud u Strazburu je nadležan da rješava sporove između pojedinaca i države (rjeđe između dvije države), to jest da odlučuje o pojedinačnim predstavkama lica koja smatraju da su im povrijeđena određena prava i slobode koje garantuje Konvencija. Time Sud dijeli takozvanu individualnu pravdu. Međutim, postoji i mogućnost da se Sud oglasi u slučajevima kada je predstavkom pokrenuto neko ozbiljno ili novo pitanje koje se tiče primjene ili tumačenja konvencije. Tada Sud koristi svoje pravo da daje autoritativno tumačenje Konvencije i rješavajući takav slučaj ne dijeli pojedinačnu pravdu, već na neki način uspostavlja jedan opšti standard pravednosti (constitutional justice) kroz razvoj i tumačenje Konvencije.[11] Upravo je ovu svoju funkciju Sud naglasio u predmetu *Ireland v. the United Kingdom* (5310/71, § 154). Naime, utvrđujući svoju ulogu u primjeni Konvencije, Sud u Strazburu je izrazio stajalište da njegovo presude ne služe samo da se riješi pojedinačan spor koji je predstavkom pokrenut pred Sudom, već, puno šire, da se razjasne, očuvaju i razvijaju pravila postavljena Konvencijom i da se time doprinese da države izvršavaju svoje obaveze koje su kao strane ugovornice preuzele ratifikovanjem Konvencije.

11) Steven Greer, "Constitutionalizing adjudication under the European Convention on Human Rights", Oxford Journal of Legal Studies, Vol. 23/2003, pp. 406-407.

3. Način rada Suda u Strazburu

Na ovo što je upravo rečeno kada je u pitanju nadležnost Suda nadovezuje se sljedeće bitno pitanje koje se tiče njegove opšte pozicije. To je pitanje načina njegovog funkcionisanja prilikom donošenja presuda. Kada je riječ o tome, fokusiraćemo se samo na jedan bitan aspekt načina funkcionisanja sudova inače, a koji je od ključnog značaja za našu temu. Naime, radi se o tome da se u teoriji,[12] grubo rečeno, prepoznaju dva ideal-tipska modela funkcionisanja sudova, odnosno načina na koji sudovi donose i obrazlažu svoje odluke. Prvi je karakterističan za kontinentalne pravne sisteme, a drugi za sisteme koji baštine common law tradiciju. Ako bismo, takođe u najkraćim i najgrubljim crtama, pokušali da oslikamo razlike između ova dva sistema presuđivanja i obrazlaganja presuda, uočili bismo prije svega dvije osnovne razlike. Prva je da su sudovi u kontinentalnom sistemu skloni da odluke donose jednoglasno (ukoliko govorimo o odlučivanju u vijećima), a i kada se odluka ne donese jednoglasno iz obrazloženja presude nije vidljivo oko čega se sudije u vijeću nisu saglasile, to jest šta su bile tačke sporenja između njih. S druge strane, presuda takvih sudova ide za tim da utvrdi šta je pravo u konkretnom slučaju a sudije su prije svega, kako ih je Monteskje u Duhu zakona slikovito opisao, "glasnogovornici" zakona, a ne

12) George Letsas, Judge Rozakis's Separate Opinions and the Strasbourg Dilemma, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1872384.

stvaraoci novih pravila. To utiče na sadržaj obrazloženja takvih presuda koji je više formalan, deklarativan, obrazloženja su opisna, kraća i uglavnom se u njima izbjegavaju razmatranja doktrinarnih ili supstantivnih pitanja koja bi se presudom konkluzivno rješavala i čime bi se postavljala pravila za neke buduće presude u sličnim slučajevima.

U obje pomenute tačke, stvari stoje drugačije kada su u pitanju sudovi koji sude u sistemima poteklim iz common law tradicije. Prvo, presude ovih sudova vrlo često nisu donesene saglasnošću svih sudija u vijeću. Ali što je još važnije, nesaglasnosti koje između sudija postoje vidljive su iz obrazloženja samih presuda kroz institut takozvanog "izdvojenog mišljenja" (separate opinion) bilo onih sudija koji su ostali u manjini (dissenting opinion) bilo sudija koji se slažu s odlukom većine, ali iz drugačijih razloga i na osnovu drugačijih argumenata (concurring opinion). Naravno, izdvojeno mišljenje u okviru ovog sistema je legitimno samo ako je argumentovano, ako se zasniva na razlozima koji su dobro obrazloženi ali i koji su principijelni, jer mogu da predstavljaju ne samo osnovu za rešenje konkretnog spora, već i da postanu osnov ili pravilo za rešavanje sličnih takvih sporova u budućnosti. Ovim se već dolazi do druge bitne tačke razlikovanja dvaju sistema funkcionisanja sudova, do načina i izgleda samog obrazloženja presude. Obrazloženje presude o ovom sistemu jeste "mjesto" na kojem se vrlo često nalaze, jedan pored drugog ,suprotstavljeni pravni argumenti, zasnovani na supstantivnim moralnim principima koji se sistematski razvijaju i pročišćavaju. Vremenom se iz takvih principa razvijaju pravna pravila (stvarajući sudske precedente), budući da u sistemu common law prava, istorijski posmatrano, sudije često nisu mogle oslonac za svoje odluke da pronađu u postojećim zakonskim pravilima. Ipak, ta dvostruka uloga sudija i sudova u ovom sistemu (da budu djelioci pravde i prava ali i stvaraoci prava) upravo je sistem common law sudovanja učinila takvim kakav jeste. Prvo, ne može se očekivati da se prilikom stvaranja precedenata između svih sudija koji u takvom slučaju odlučuju uvek javlja jednoglasnost povodom principa koji će rješiti konkretan spor i koji će u buduće da bude važeće pravo, baš kao što se takva opšta saglasnost ne pojavljuje nikada ni kod zakonodavca koji stvara opšta zakonska pravila. Otuda su izdvojena mišljenja uobičajena praksa. I drugo, budući da u takvim slučajevima ne slijede postojeće već stvaraju novo pravo sudije su, zarad legitimnosti precedentnog pravila i zarad otklanjanja sumnji o njihovoj arbitrarnosti, na neki način podstaknute da što detaljnije i razložnije opravdaju svoje odluke. I zbog toga nisu samo izdvojena mišljenja često dugi traktati o tome koji princip ili pravilo zapravo treba da riješi konkretan slučaj, a i da postane precedentno pravilo za budućnost, već je to i sâma presuda u cjelini.

Ako sada kroz prizmu pomenute podjele, pogledamo način na koji funkcioniše Sud u Strazburu jasno ćemo uočiti da je u obje tačke on bliži sudovima common law tradicije nego kontinentalnom pravosuđu. Najprije, jednoglasne presude u vijećima Suda postaju sve više izuzetak nego pravilo, a neka od "izdvojenih mišljenja" predstavljaju prave male argumentativne "revolucije" kojima se začinju rasprave o supstantivnim principima na osnovu kojih Sud (treba da) odlučuje u budućnosti. Drugo, i još značajnije za razumijevanje sudske prakse Suda u Strazburu i načina njegovog rada, jeste da u obrazloženjima njegovih presuda koja su duga, diskurzivna i dobro argumentovana, nailazimo na preispitivanje i razvijanje starih, a ponekad i na uspostavljanje novih supstantivnih principa na osnovu kojih se donosi konačna presuda i koji postaju osnova za donošenje budućih presuda u sličnim slučajevima. Kratko rečeno, sudije Suda u Strazburu ne nalikuju Monteskjeovim "glasnogovornicima" prava, već vrlo često postaju njegovi kreatori.[13]

13) To je, uostalom, jasno vidljivo i na primjeru prava na obrazloženu presudu i standarda dobrog argumentovanja i obrazlaganja koji su glavna tema ovog teksta.

Sve u svemu, način rada sâmog Suda u Strazburu otkriva nam, dakle, kako Sud prilikom primene Konvencije svojim odlukama širi obim u njoj utvrđenih prava i sloboda i kako takve odluke obrazlaže. I kao što je rečeno, taj način je veoma blizak načinu na koji to isto čine sudovi u sistemu common law. Međutim, kada je reč o sâmom obrazlaganju odluka, treba naglasiti da praksa temeljnog i promišljenog obrazlaganja sudskih presuda svakako nije povezana samo s jednim pravnim krugom ili sistemom već proizlazi iz osnovnih principa vladavine prava na kojem se zasnivaju savremeni pravni poreci demokratskih država, iz prava na pravično suđenje koje je sastavni dio Konvencije i drugih međunarodnih i nacionalnih pravnih akata, pa najposle i iz prakse samog Suda u Strazburu. Stoga je obaveza obrazlaganja, davanja valjanih razloga za odluke, praksa dobre argumentacije i interpretacije obavezujuća i za sudove (i tribunale uopšte) u okviru svih onih nacionalnih poredaka koji pretenduju na epitet demokratskih. U ključnom poglavlju publikacije vidjećemo koje standarde presuđivanja ta obaveza podrazumijeva sa stanovišta prakse Suda u Strazburu.

4. Principi i interpretativna načela suda

Nijedno od interpretativnih načela Suda nema objektivno značenje koje bi se na istovjetan i direktan način primjenjivalo u svakoj situaciji. To je nešto, na šta smo, podsjećanja radi, ukazali još u prvom odjeljku ovog teksta: prihvatljivi argumenti u pravnom rasuđivanju nisu gotov recept, niti uvijek svi vode ka jednom smjeru – ka uvijek ispravnoj odluci u svakom spornom slučaju. Često su prihvaćeni principi i interpretativni argumenti u međusobnom sukobu, a na donosiocu odluke je da, opet primjenom određenih principa, odredi kojima će dati prednost prilikom donošenja konačne odluke.

Ipak, vrlo je bitno poznavati najvažnija interpretativna načela i principe koje Sud u Strazburu najčešće navodi u obrazloženjima svojih presuda, jer ona mogu poslužiti kao heuristička sredstva u predviđanju budućih odluka Suda, a na taj način i u tumačenju i primjeni nacionalnog prava na način da ta primjena ne bude u suprotnosti s praksom Suda u Strazburu.

Načelno govoreći, Sud u Strazburu se svojom višedecenijskom praksom nametnuo kao dinamičan i kreativan tumač odredbi Konvencije, jer je manje više kroz praksu stvorio ono što smo u početnom poglavlju nazvali listom ili popisom prihvatljivih principa i interpretativnih argumenata. I koristeći uglavnom te principe i argumente, pristupajući Konvenciji svrhovito i evolucionistički, dospio u poziciju da bude aktivan činilac u proširivanju sadržaja i kvaliteta ljudskih prava i sloboda koja su izvornim tekstom Konvencije garantovana.

Od principa i interpretativnih argumenata koje Sud koristi, u ovom odjeljku osvrnućemo se samo na nekoliko najznačajnijih, u smislu da se na njih Sud najčešće poziva i da ih koristi i prilikom interpretacije i primjene člana 6. Konvencije. To su, prije svega, načelo supsidijarnosti (i iz njega proističući princip "četvrte instance") prema kojem je mehanizam zaštite ljudskih prava koji je uspostavljen Konvencijom dopunski ili supsidijaran u odnosu na nacionalne pravne poretke država ugovornica, na kojima leži primarna odgovornost za ostvarivanje i zaštitu ljudskih prava utvrđenih Konvencijom. Pored tog načela, u primjeni Konvencije izuzetno važnu ulogu ima i načelo efektivnosti prema kojem, ljudska prava i slobode koje Konvencija štiti i garantuje nisu "teorijska i iluzorna, nego praktična i efektivna[14]". Takođe, svojom jurisprudencijom Sud je do kraja afirmisao princip da je Konvencija "živ dokument" (living instrument) i da to podrazumijeva tumačenje njenih odredaba u skladu sa savremenim okolnostima, a ne u skladu s namjerom tvoraca Konvencije. Najzad, uz pomenuta tri načela, načelo proporcionalnosti takođe igra važnu ulogu u tumačenju Konvencije kroz pronalaženja balansa između javnog i privatnog interesa. Smisao tog načela je da se ograničenja ljudskih prava zarad javnog interesa moraju opravdati dovoljno bitnim razlozima, a da samo ograničenje mora da bude proporcionalno cilju koji se tim ograničenjem ostvaruje. U nastavku ovog poglavlja analiziraćemo nešto detaljnije svako od ovih načela.

14) Airey v. Ireland, 6289/73.

4.1. Načelo supsidijarnosti i doktrina "četvrte instance"

U najopštijem smislu govoreći, načelo supsidijarnosti bi se moglo definisati kao princip vertikalne podjele vlasti između najmanje dva različita nivo vlasti na način da u istoj materiji oni dijele nadležnost prema načelu efikasnosti. To znači da se podjela nadležnosti zasniva na ideji da će radnje radi ostvarenja ciljeva zbog kojih je nadležnost uspostavljena preduzeti onaj nivo vlasti koji ih može efikasnije ostvariti. U tom smislu, treba napomenuti da je to po pravilu niži nivo vlasti, jer se on nalazi bliže građanima, ostvaruje neposredniji odnos sa njima, i manje više zbog toga uživa veću legitimnost, pa je iz tih razloga u boljoj poziciji da efikasnije procjeni koje mjere treba da preduzme, te na kraju da te mjere i sprovede.

U jednoj od svojih presuda Sud u Strazburu je konstatovao da je „mehanizam zaštite osnovnih prava ustanovljen Konvencijom supsidijaran u odnosu na nacionalne sisteme zaštite ljudskih prava."[15] U drugoj presudi, pozivajući se na član 1. Konvencije u kojem se ističe da su upravo države ugovornice dužne da garantuju i štite prava i slobode ustanovljene Konvencijom, a unutar granica svojih nadležnosti i da su glavni mehanizmi zaštite tih prava nacionalni pravni poreci država ugovornica, Sud ističe da je njegova uloga samo supervizorska, u skladu s načelom supsidijarnosti. Prema tome, sistem zaštite ljudskih prava i sloboda ustanovljenih Konvencijom, a čiji je dio i Sud u Strazburu u dobroj mjeri počiva upravo na načelu supsidijarnosti,[16] odnosno na principu da su države ugovornice prvenstveno odgovorne za sprovođenje i zaštitu tih prava i sloboda.

15) Sisojeva et al. v. Latvia, 60654/00, § 90.

16) Z et al. v. the United Kingdom, 29392/95, § 103.

Tipičan primjer kako se duh ovog principa ovaploćuje i konkretizuje kroz tekst Konvencije je kriterijum za pristup Sudu i prihvatljivost predstavki. U članu 35, stavu 1. Konvencije stoji da "Sud može uzeti predmet u postupak tek kada se iscrpu svi unutrašnji pravni lijekovi". Drugi karakterističan "derivat" načela supsidijarnosti je takozvano "polje slobodne procjene" (margin of appreciation), prema kojem je državama ugovornicama ostavljeno izvjesno polje slobodne procjene u ostvarivanju ljudskih prava i sloboda garantovanih Konvencijom, dakle diskrecije oko toga na koji će način ta prava i slobode da se ostvaruju u konkretnim uslovima konkretne države. Najzad, "derivat" načela supsidijarnosti koji je od posebnog značaja za temu ovog priručnika je princip koji nije propisan Konvencijom, već se uspostavio kroz praksu Suda a koji je u tijesnoj vezi upravo s primjenom člana 6. Konvencije. To je takozvani princip ili doktrina "četvrte instance".

Sud u Strazburu je u nizu svojih odluka isticao da njegova uloga nije da odlučuje u svojstvu apelacionog suda, dakle, u svojstvu suda treće ili četvrte

instance[17] i da ispituje da li su presude nacionalnih sudova donijete u skladu s odgovarajućim nacionalnim pravom. U tom smislu, za razliku od klasičnog apelacionog suda u jednom pravosudnom sistemu, Sud u Strazburu se ne bavi, primjera radi, time da li su dokazi u postupku prikupljeni u skladu s domaćim pravom, da li je nacionalni sud te dokaze ispravno ocijenio, da li je sud ispravno protumačio odgovarajuće domaće propise, to jest ispravno riješio pravna pitanja i najposle, da li je presuda koja je donijeta u skladu sa domaćim zakonodavstvom. Ili kako je to Sud lapidarno sumirao u jednoj od svojih presuda: "U skladu s članom 19. Konvencije, dužnost Suda je da osigura izvršavanje obaveza koje su potpisivanjem Konvencije države ugovornice prihvatile. Naročito, funkcija Suda nije da se bavi pogrešnim odgovorima na faktička ili pravna pitanja koje eventualno daje nacionalni sud u nekom postupku, *osim ukoliko time nisu povrijeđena prava i slobode koje Konvencija garantuje*."[18]

U jednoj od svojih novijih presuda Sud dalje precizira da njegov zadatak nije da procjenjuje činjenice koje su navele nacionalni sud da odluči na jedan a ne na drugi način. Primjena doktrine "četvrte instance" znači i da argumenti koje je podnosilac predstavke iznosio pred nacionalnim sudom, a koji od strane tog suda nisu uvaženi, ne mogu biti podržani ni od strane Suda u Strazburu.[19]

Međutim, kao i ostali interpretativni principi, tako i doktrina "četvrte instance" nije apsolutan princip koji bez izuzetka nadjačava sve ostale u svim slučajevima u kojima se on može primijeniti. Istina, prag njegove primjene je visok, ali je ipak prag – dakle nešto što Sud ponekad i "preskoči". Uostalom, da nije tako, Sud nikada ne bi, primjera radi, dospio ni do ideje da obrazloženje presude domaćeg suda mora da ispuni određene standarde kako bi bilo u skladu s pravom na obrazloženu presudu.

U jednoj od presuda, u kojoj taj prag nije preskočen, Sud je ipak nagovijestio u čemu se on sastoji. Naime tom presudom, Sud je odbacio zahtjev podnosioca predstavki koji je bio zasnovan na tvrdnjama da su domaći sudovi donijeli presudu protiv podnosioca predstavke bez dovoljno dokaza. Na početku presude, sud ponavlja princip "četvrte instance" i naglašava da je nacionalni sud u boljoj poziciji da procjenjuje kredibilnost izjava svjedoka i relevantnost drugih dokaza u predmetnom slučaju, a zatim konstatuje da "nije pronašao elemente koji bi vodili ka zaključku da je domaći sud, utvrđujući činjenice i tumačeći domaće pravo, djelovao na arbitraran ili nerazuman (unreasonable) način."[20] Dakle, prag principa je relativno visok: u postupanju nacionalnog suda mora da postoji očigledna arbitrarnost ili nerazumnost da bi Sud u Strazburu odstupio od principa "četvrte instance"

17) Otuda i naziv za ovaj princip, premda bi prikladniji naziv za taj princip, imajući u vidu njegovu sadržinu, bi "princip ne-četvrte instance".

18) Schenk v. Switzerland, 10862/84, para 45

19) Tautkus v. Lithuania, 29474/09, § 57

20) Sebahattin Evcimen v. Turkey, 31792/06, § 25.

i upustio se u meritorno preispitivanje zasnovanosti presude nacionalnog suda. U pomenutoj presudi, međutim, Sud se nije upustio u objašnjavanje značenja termina "arbitrarnost" ili "nerazumnost". U drugoj presudi, međutim, Sud pominje ovaj standard smatrajući da on nije narušen pošto su zaključci domaćeg suda u konkretnom slučaju donijeti "nakon dužeg adverzijalnog procesa argumentovanja i u svetlu svih podataka koje su advokati podnosilaca predstavke pred domaćim sudom iznosili u prilog svojih klijenata."[21] Dodatno precizirajući upravo ovakvo svoje shvatanje o tome šta je "arbitrarno" ili "nerazumno" postupanje domaćeg suda, ponovo na negativan način, Sud utvrđuje da "sve dok je odluka domaćeg suda zasnovana na potpunoj i cjelovitoj procjeni svih relevantnih faktora [...] takva odluka neće biti podložna preispitivanju od strane Suda."[22] Prema tome, Sud neće ulaziti u razloge koji su vodili nacionalni sud ka zaključcima o faktičkim i pravnim pitanjima konkretnog slučaja ali ako tih razloga nema ili su protivrječni ili su očigledno arbitrarni onda je to neobrazložena presuda – i onda se prekoračuje prag principa "četvrte instance" i onda se utvrđuje da je podnosiocu predstavke povrijeđeno pravo na pravično suđenje, garantovano članom 6. Konvencije.

21) I.J.L. et al. v. the United Kingdom, 29522/95, 30056/96, 30574/96, § 99

22) Lalmahomed v. the Netherlands, 26036/08, § 37.

Dakle, jasno je da Sud povremeno zaista odlučuje kao apelacioni sud (kao sud treće ili četvrte instance) i da na taj način djeluje protivno principu da on nije sud koji treba da procjenjuje valjanost interpretacije domaćih propisa ili način na koji su rešena činjenična pitanja od strane nacionalnog suda. Kao što jurisprudencija Suda pokazuje, on je veoma aktivan kada treba da ispita da li se poštuju prava koja se štite članom 6, pa čak i da ta prava po potrebi sopstvenom praksom "proširuje". Ipak, ako je odluka nacionalnog suda zasnovana na potpunoj i cjelovitoj procjeni svih faktičkih i pravnih pitanja, Sud će pozivom na princip "četvrte instance" izbjeći da preispituje odluku domaćeg suda.

4.2. Efektivnost

Princip efektivnosti ili djelotvornosti obično se smatra sastavnim dijelom svakog medjunarodnog sistema zaštite ljudskih prava. On je ugrađen u odredbe svih medjunarodnih dokumenata, a dodatno se učvršćuje kroz primjenu i interpretaciju od strane nadnacionalnih institucija koje štite i garantuju ostvarenje garantovnih ljudskih prava. Kada je reč o sâmoj Konvenciji, na više mjesta se načelo efektivnosti ili djelotvornosti ističe kao bazični princip u zaštiti ljudskih prava i rješavanju sporova koji nastaju povodom kršenja odredbi Konvencije. Već u samoj preambuli, u stavu tri ističe se da Konvencija ima "za cilj da osigura obezbijedi i opšte i djelotvorno priznanje (effective recognition) i poštovanje prava prava proklamovanih

u njoj", a da će, s druge strane ta prava najbolje biti očuvana unutar režima "stvarne političke demokratije". Osim toga, član 13 Konvencije pominje "djelotvoran pravni lijek" koji treba da bude na raspolaganju svima čija su ljudska prava prekršena, dok član 34 obavezuje države ugovornice da "ni na koji način ne ometaju efikasno vršenje" prava svojih građana da podnose predstavke Sudu u Strazburu.

Međutim, ono što je još važnije za našu temu jeste interpretativni značaj ovog načela. Najpre, Sud se u svojim presudama često poziva na ovaj princip, kada se predstavkom pokrene pitanje efektivnog ostvarenja nekog od prava iz Konvencije.[23] Ali takođe i drugi međunarodni dokumenti sadrže odredbe koje pozivaju na njihovu efektivnu implementaciju. U tom smislu veoma je značajna Bečka konvencija o ugovornom pravu iz 1969. Sud u Strazburu u više svojih presuda insistira da se odredbe Konvencije ne tumače u pravnom vakumu, već da se njene odredbe moraju interpretirati u skladu s normama i principima međunarodnog javnog prava, a naročito s odredbama pomenute Bečke konvencije,[24] Budući da se u Bečkoj konvenciji, u njenom članu 31, pored ostalog, ističe da se odredbe međunarodnih ugovora tumače (1) u dobroj veri i (2) imajući na umu svrhu koja proizlazi iz njihove preambule i teksta, iz toga proizlazi da je princip efektivnosti i djelotvornosti bez sumnje jedan od osnovnih interpretativnih argumenata Suda prilikom donošenja mnogih od njegovih presuda, pošto je on inherentan objema pomenutim odredbama Bečke Konvencije ("tumačenje u dobroj veri" i "teleološko tumačenje u skladu s tekstom preambule[...]").[25]

23) Airey v. Ireland, 6289/73; Bellet v. France, 40832/98, § 38

24) Airey v. Ireland, 6289/73; Bellet v. France, 40832/98, § 38

25) Richard Gardiner, Treaty Interpretation, Oxford: Oxford University Press, 2008, 160.

4.3. Konvencija kao "živ dokument" – evolucionističko tumačenje konvencije

Već jako dugo u svojoj sudskoj praksi Sud u Strazburu primjenjuje princip prema kojem Konvenciju treba tumačiti kao "živ dokument" (living instrument) ili kako bismo u tradiciji naše pravne teorije to rekli, tumačiti je evolucionistički.[26] Naime, prvi put je Sud iznio ovaj princip još 1978 u presudi Tyrer v. the United Kingdom (5856/72) kada je nedvosmisleno naveo da je Konvencija "živi dokument koji...se mora tumačiti u svijetlu današnjih uslova" (§ 31).

26) Up. Radomir Lukić, Teorija države i prava, II knjiga, Beograd: Naučna knjiga, 1958, str. 230 i dalje.

Tokom primjene tog načela, Sud u Strazburu je razradio ovu ideju u nizu potonjih presuda, tako da se danas u teoriji[27] iznosi stav da princip evolucionističkog tumačenja, onako kako ga Sud primjenjuje, ima tri osnovne karakteristike. Najprije, prilikom tumačenja Konvencije, odnosno njenih standarda i izraza, Sud gotovo nikada ne ulazi u to šta su bile namjere sastavljača Konvencije i kako su oni razumijevali značenje tih standarda i izraza ili koje su specifično pravo željeli da zaštite, već ih tumači, kao što je

27) George Letsas, "The ECHR as a Living Instrument: Its Meaning and Legitimacy", http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2021836.

u navedenoj presudi i istaknuto, u skladu "s današnjim standardima" (present-day standards) ili kako je to rečeno u jednoj drugoj presudi"[28] u svijetlu današnjih uslova" (in the light of present-day conditions).

Drugo, kada se radi o "današnjim standardima", Sud prije svega ima ne umu ono što su zajednički ili opšti standardi koje prihvataju zemlje ugovornice.[29] Primjera radi, ukoliko je telesno kažnjavanje u zemljama ugovornicama uglavnom zabranjena ili prevaziđena sankcija, Sud će smatrati to kao opšti savremeni standard koji će onda primjenti u konkretnom slučaju u kojem je odgovorna država taj standard prekršila i prihvatiti zahtjev podnosioca takve jedne predstavke. I najzad, treće, iz ovoga prethodnog proizlazi da se Sud prilikom razmatranja šta su prihvatljivi standardi zaštite ljudskih prava neće rukovoditi načinom na koji se ti standardi shvataju u državi koja je u sporu pred Sudom, ne samo od strane javnog mnjenja, nego i od strane zakonodavca. Ova treća karakteristika principa evolucionističkog tumačenja zaslužuje dodatnu pažnju, jer se unutar nje krije još jedan važan princip kojem Sud često pribjegava prilikom tumačenja Konvencije i to ne samo prilikom evolucionističkog tumačenja. Riječ je o takozvanoj "doktrini autonomnog značenja" pojmova iz Konvencije. Prema toj "doktrini" izrazi iz Konvencije imaju autonomno značenje, odnosno tumače se u okvirima same Konvencije, a ne na osnovu onoga što oni znače u odgovarajućem nacionalnom pravu.[30]

Značenje koje određeni izraz ima (recimo izrazi "sud" ili "krivična sankcija" ili "građanska prava i obaveze") u domaćem pravu države koja je učesnik u sporu pred Sudom može biti samo polazna tačka u tumačenju, ali ne obavezno i konačna tačka. I kao što smo upravo pojasnili, to je naročito vidljivo kada se evolucionistički tumače neki izrazi iz Konvencije, jer se tom prilikom Sud oglušuje o način na koji se standardi iz Konvencije tumače u nacionalnom pravu države koja je u sporu pred Sudom. Kao što će se kasnije pokazati, "doktrina autonomnog značenja" se često koristi prilikom tumačenja članova Konvencije, pa i člana 6.[31]

Iz svega što je rečeno, može se zaključiti da je Sud svojom praksom stvorio od Konvencije dinamičan instrument koji je u stanju da se prilagodi potrebama savremenog doba, i današnjeg vremena, to jest da pruži odgovore na sporne situacije koje niti su postojale niti su se mogle zamisliti u vreme kad je Konvencija pisana, kao što su sporovi vezani za transrodne osobe, za homoseksualne veze, vanbračno rođenu djecu, tjelesno kažnjavanje itd. Osim toga, premda se primjena evolucionističkog tumačenja češće pojavljuje prilikom donošenja presuda o povredi nekih drugih članova Konvencije, Sud je u jednoj od svojih odluka konstatovao i da se član 6. mora tumačiti u svjetlosti savremenih uslova, uz istovremeno uzimanje u obzir preovlađuju-

28) Rantsev v. Cyprus and Russia, 25965/04, § 272-282.

29) To ne znači da će Sud primijeniti jedan takav "savremeni" standard samo pod uslovom da oko njega postoji konsenzus, to jest da su sve (ostale) države ugovornice taj standard prihvatile ili ozakonile. Štaviše, novija sudska praksa Suda u Strazburu ide za tim da sve više prihvata kao "današnje zajedničke standarde" u smislu izvjesnog apstraktnog značenja koje se pokazuje kroz postojanje određenih međunarodnih koncepcija (koje nisu ratifikovane od strane većine država) i kroz trendove koji postoje u razvoju društvenih uvjerenja (vidjeti: Tyrer v. the United Kingdom, 5856/72, § 183; novije presude uključuju na primjer: S.W. v. the United Kingdom, 20166/92, § 43; Ünal Tekeli v. Turkey, 29865/96, § 62).

30) Engel et al. v. Netherlands, 5100/71; 5101/71; 5102/71; 5354/72; 5370/72.

31) Autonomni koncepti su termini iz Konvencije koji (mogu da) postoje u nacionalnim pravnim sistemima država ugovornica Konvencije, ali kojima se u praksi Suda, kako je već objašnjeno, pridaje autonomno značenje u odnosu na ono koje ti termini (mogu da) imaju u nacionalnom zakonodavstvu. Najvažnije odlike autonomnih koncepata su da ih nije lako definisati, da su često neusklađeni sa glavnim pravnoteorijskim tokovima, da nemaju uporište u uporednom pravu i da su podložni razvoju (up. Dragoljub Popović, Postanak evropskog prava ljudskih prava: Esej o sudskoj kreativnosti, preveli Vanja i Miodrag Jovanović, Beograd: Službeni glasnik, 2012, str. 131-132). U četvrtom poglavlju će se na primjeru shvatanja Suda o tome šta sve u nacionalnom pravu može da ima status tribunala, ova doktrina i njen značaj za temu ovog priručnika najbolje razumjeti.

ćih ekonomskih i socijalnih uslova"[32] i stoga je tom načelu argumentacije i posvećena dodatna pažnja.

32) Marckx v. Belgium, 6833/74, § 41.

4.4. Analiza proporcionalnosti kao način primjene normi o ljudskim pravima

Pravo na obrazloženu presudu je, kao i ostala prava iz Konvencije, ljudsko pravo. Norme kojima se utvrđuju ljudska prava u jednom pravnom sistemu mogu biti formulisane ili kao pravna pravila ili kao pravni principi. Kada su formulisane kao pravna pravila, djelatnost suda se sastoji u utvrđivanju da li neki državni organ postupio suprotno pretpostavci pravne norme kojim je ljudsko pravo ustanovljeno. Ako sud utvrdi da je učinjen postupak koji je suprotan pretpostavci norme, sud je dužan da presudi da je od strane državnog organa učinjen prekršaj ljudskog prava. Propiše li se, na primjer, da je u radnim sporovima krajnji rok za presuđivanje dvije godine, sud pred kojim se vodio postupak u trajanju od dvije godine i šest mjeseci je nedvosmisleno prekršio nečije pravo na suđenje u razumnom roku.

Uprkos tome što su ljudska prava nekada normirana kao pravila (suđenje u razumnom roku je primjer za to), u najvećem broju slučajeva norme o ljudskim pravima ne propisuju uslove za sopstvenu primjenu, već daju prima facie zapovijesti. Šta to u praksi znači? Sloboda kretanja jeste, na primjer, sastavni dio Konvencije, ali i većine savremenih nacionalnih ustava, uključujući tu i Ustav Crne Gore (član 39). Ako organ lokalne samouprave u cilju zakonitog obnavljanja ulica i fasada u jednom dijelu grada, blokira taj dio grada i onemogući građane da se slobodno kreću, može se postaviti pitanje da li je time prekršeno pravo na slobodu kretanja. Odgovor na to pitanje ne možemo dobiti tako što ćemo provjeriti da li je državni organ ispunio uslov ili pretpostavku norme o slobodi kretanja, jer je norma kojom je ustanovljena sloboda kretanja - bezuslovna. Tekst relevantne norme glasi prosto: Jemči se pravo na slobodu kretanja [...]". U tom smislu se može činiti da su norme o ljudskim pravima, ako su bezuslovne pa tako i ne predstavljaju pravna pravila već predstavljaju pravne principe, puke proklamacije. Praksa ustavnih sudova širom svijeta i praksa Suda u Strazburu pokazuje da nije tako. Pravni principi se primjenjuju drugačije od pravnih pravila, ali se ipak redovno primjenjuju od strane sudova.

Kada se suoči s potencijalnim kršenjem nekog principa koji se tiče ljudskih prava, sud je dužan da obavi tzv. analizu proporcionalnosti. Analiza proporcionalnosti je način na koji se primjenjuju pravni principi, tj. način na koji se primjenjuju norme o ljudskim pravima. Njen cilj jeste da ispita da li je aktom državnog organa prekršeno određeno ljudsko pravo i u ko-

joj mjeri. Za Sud u Strazburu proporcionalnost predstavlja osnovni princip na osnovu kojeg se cijeni da li je određena mjera državnih organa kojom se ograničava ljudsko pravo opravdana ili ne. Osnovna namjera u pozadini odmjeravanja proporcionalnosti jeste uspostavljanje srazmjernosti između javnih ciljeva i individualnih prava u demokratskom društvu, na način kojim se ljudska prava neće ograničiti više nego što je neophodno. U teoriji, analiza proporcionalnosti podrazumijeva četiri osnovna koraka: 1. sudija utvrđuje da li je organ državne vlasti zakonom ovlašćen da preduzme takvu mjeru, 2. sudija provjerava da li je mjera razumno povezana s izričitim ciljem koji se namjerava ostvariti normom, 3. sudija utvrđuje da li mjera ograničava neko pravo više nego što je neophodno da bi vlast ostvarila izričito postavljeni cilj, 4. sudija "odmjerava" ili "balansira" provjeravajući koristi od mjere vlade u odnosu na "troškove" koji nastaju ograničavanjem prava i odlučuje na koji će se način u konkretnom slučaju riješiti konflikt između ustavnog principa na kojem je zasnovana mjera i ustavnog principa na kojem je zasnovano pravo.

Kako bi to izgledalo u našem primjeru ograničenja prava na slobodu kretanja? (1) U prvom koraku je sud dužan da utvrdi da li je organ lokalne samouprave zakonom ovlašćen da onemogući kretanje lica i vozila radi rekonstrukcije ulica i fasada u gradu. Član 32. Zakona o lokalnoj samoupravi nedvosmisleno utvrđuje da je jedna od nadležnosti lokalne samouprave ta da "uređuje i obezbjeđuje obavljanje poslova izgradnje, rekonstrukcije, održavanja i zaštite lokalnih i nekategorisanih puteva, kao i ulica u naseljima". Pretpostavlja se da organ lokalne samouprave može preduzeti određene mjere da bi tu svoju nadležnost obavio. Odgovor na prvo pitanje jeste, dakle, pozitivan – državni organ je u ovom slučaju zakonski ovlašćen da obnovi puteve i fasade. (2) Mjera zabrane kretanja ili ograničenje kretanja određene vrste je svakako neophodna da bi se obnovile fasade i ulice, pa je povezanost između mjere i cilja nedvojbeno razumna. (3) Treće pitanje jeste da li je mjerom zabrane kretanja pravo na slobodu kretanja ograničeno više nego što je neophodno da bi se ostvario zakonit cilj – obnavljanje ulica i fasada. U našem slučaju je jasno da s obzirom na opasnost koja postoji od obnavljanja ulica i fasada, kao i s obzirom na to da je riječ o privremenom i manjem ograničenju slobode kretanja, mjera zabrane kretanja u određenom dijelu grada je neophodna da bi se cilj ostvario bez veće štete za ljude i imovinu.[33] (4) Konačno, razuman odgovor na četvrto pitanje jeste da je ograničenje slobode kretanja u jednom dijelu grada na kratko vrijeme minorno u odnosu na koristi koje se ostvaruju obnavljanjem ulica i fasada u dijelu grada, pa je razumno da sud zaključi da ne postoji povreda prava na slobodu kretanja.

33) Podrazumijeva se da određena pitanja u okviru analize proporcionalnosti zahtijevaju evaluaciju. Po nekim pravnim teoretičarima, sudija je u okviru trećeg pitanja pozvan da ocjeni da li je ograničenje ljudskog prava manje, srednje ili značajno i veliko, te da na osnovu toga odluči da li je ljudsko pravo neopravdano ograničeno. Formalni modeli sudijskog odlučivanja nisu, ipak, od neposrednog značaja za rad. Načelno postavljeno sudijski poziv nužno podrazumijeva procjene, interpretacije i evaluacije u skladu s pravom, profesionalnom etikom i sopstvenom savješću, bez obzira na to da li je riječ o primjeni pravili ili o primjeni principa.

U interpretaciji Suda analiza proporcionalnosti podrazumjeva prethodni i glavni postupak. U okviru prethodnog postupka Sud a) utvrđuje da li je mjera države ograničila ljudsko pravo i b) da li je ograničenje ljudskih prava propisano zakonom? Glavni dio postupka analize proporcionalnosti podrazumjeva takođe nekoliko koraka: 1) Utvrđuje se da da li je preduzeta mjera legitimna, tj. da li je nužna u demokratskom društvu. Sud zauzima stanovište da je u ovom određenom smislu državna mjera kojom se ograničava ljudsko pravo legitimna ukoliko a) odgovara hitnoj društvenoj potrebi, b) ukoliko je mjera proporcionalna konkretnom cilju koji se mjerom ostvaruje, a c) razlozi koje država daje za opravdanje mjere moraju biti relevantni i dovoljni. Ograničenje mora biti takvo da je u najmanjoj mogućoj mjeri restriktivno sa stanovišta ograničenja ljudskih prava, a da se njime i dalje može postići legitimni društveni cilj.[34]

34) Vidjeti npr: Hadjianastassiou v. Greece, 12945/87, § 41-47.

POGLAVLJE III

Član 6: Pravo na pravično suđenje

1. Uopšte o članu 6. Konvencije

Član 6. Konvencije jemči pravo na pravično suđenje (right to a fair trial). Taj član jemči procesna prava stranaka u parničnom postupku (član 6. Stav 1) i prava optuženog u krivičnom postupku (član 6. stavovi 1, 2. i 3). Dakle, dok drugi i treći stav člana 6. sadrže odredbe koje postavljaju minimalne standarde prava lica koja su optužena u krivičnom postupku, dotle se stav 1. jednako primjenjuje i na građanske i na krivične postupke. Tekst tog ključnog stava glasi:

„Svako, tokom odlučivanja o njegovim građanskim pravima i obavezama ili o krivičnoj optužbi protiv njega, ima pravo na pravičnu i javnu raspravu u razumnom roku pred nezavisnim i nepristrasnim sudom, obrazovanim na osnovu zakona. Presuda se izriče javno, ali se štampa i javnost mogu isključiti s cijelog ili s dijela suđenja u interesu morala, javnog reda ili nacionalne bezbjednosti u demokratskom društvu, kada to zahtijevaju interesi maloljetnika ili zaštita privatnog života stranaka, ili u mjeri koja je, po mišljenju suda, nužno potrebna u posebnim okolnostima kada bi javnost mogla da naškodi interesima pravde."

Pravima koja garantuje član 6, Konvencija potvrđuje načelo vladavine prava na kome počiva demokratsko društvo, kao i nezaobilaznu ulogu koju sudstvo ima u sprovođenju pravde.[35] Njegova sadržina odražava ideju tvoraca Konvencije da pored prava koja utemeljuju osnovne slobode, treba ustanoviti i takozvana "zaštitna prava", to jest prava koja će omogućiti efikasnu zaštitu garantovanih osnovnih sloboda. A pravo na pravično suđenje iz člana 6. (a naročito iz stava 1. tog člana) je najvažnije takvo pravo.

35) Airey v. Ireland, 6289/73, § 24; Stanev v. Bulgaria, 36760/06, § 231.

Ono obuhvata kako prava organizacionog (recimo, pravo na nezavisan i nepristrasan sud), tako i prava procesnog karaktera (recimo, pravo na javnost rasprave). U okviru ove druge grupe prava moguće je posebno izdvojiti prava koja se tiču samog postupka i prava koja se tiču sudske odluke. U ovu drugu grupu prava procesnog karaktera spada i pravo na obrazloženu presudu, koje je centralna tema ovog priručnika.

Član 6. stav 1. se ne odnosi na takozvanu supstantivnu pravičnost. Termin "pravičan" (fair) se ne shvata u njegovom etičkom ili pravnom smislu, to jest u smislu u kojem ga shvata sudeći sud koji ide za tim da njegove presude budu "pravične". Značenje termina "pravičan" (u sintagmama fair trial

ili fair hearing) interpretira se, pre svega, u formalnom, proceduralnom smislu. To znači da se Sud u Strazburu u odlukama koje se odnose na član 6. bavi time da li su podnosiocu predstavke pružene mogućnosti da svoje pretenzije ostvari pred adekvatnim organom ("tribunalom"), u postupku u kojem su mu pružene jednake proceduralne mogućnosti kao i suprotnoj strani da iznese argumente i dokaze u prilog svog slučaja, kao i da ospori argumente i dokaze druge strane. Takođe, "pravičnost" postupka se procjenjuje u cjelini, odnosno neka pojedinačna nepravilnost ne mora biti dovoljna da bi se postupak u cjelini ocijenio kao "nepravičan."[36]

36) Miroļubovs et al. v. Latvia, 798/05, § 103.

Ocjenjujući postupanje domaćeg suda u svijetlu člana 6. st. 1, Sud se, shodno načelu "četvrte instance", po pravilu ne upušta u to da li je domaći sud na ispravan način primijenio nacionalne propise i da li su pravna i faktička pitanja riješena u skladu s tim propisima. Stoga, hipotetički posmatrano, odluka nacionalnog suda koja se predstavkom osporava može biti zasnovana na istinitim činjenicama i u skladu s važećim nacionalnim pravom, ali pošto se Sud bavi proceduralnim kontekstom u najširem smislu riječi, a ne rješava iznova faktička i pravna pitanja koja su odlukom rešena, takva odluka pred Sudom u Strazburu može, figurativno rečeno, "pasti". Ipak, treba odmah napomenuti, da se, u skladu s napomenama o doktrini "četvrte instance" koje su iznijete u prethodnom poglavlju, ovaj princip ne tumači kao apsolutan, već ga Sud ponekad prekoračuje, odmjeravajući njegovu snagu prema drugim principima (prije svega, prema evolutivnom i efektivnom principu), a naročito u slučaju kada se u postupku pojavi očigledno arbitrarno ili nerazumno postupanje nacionalnog suda.

Konačno, premda se odnosi na postupke pred sudovima (a o tome kako Sud shvata pojam tribunala, govori se u narednom poglavlju), treba naglasiti da se član 6. st. 1, ne odnosi i ne primjenjuje na postupke koji se vode pred nacionalnim ustavnim sudovima kada oni odlučuju o ustavnosti i zakonitosti opštih akata in apstracto.[37] Samo izuzetno, član 6. se može odnositi i na takve postupke ukoliko oni utiču na ishod spora koji je predmet predstavke a na koji se primjenjuje član 6.[38]

37) Valašinas v. Lithuania, 44558/98.

38) Olujić v. Croatia, 22330/05, § 31–43.

2. Koja prava štiti član 6, stav 1?

Odgovor na pitanje koja konkretna prava štiti član 6, naročito njegov prvi stav, koji je u fokusu naše pažnje, nikako se ne može dobiti njegovim pukim iščitavanjem. Štaviše, lista tih prava ni u jednom trenutku se ne može smatrati zaokruženom i konačnom. Zbog čega je to tako? Razlozi se prije svega kriju u interpretativnom pristupu Suda odredbama Konvencije, a naročito ovoj odredbi. Koristeći interpretativna načela o kojima je bilo govora u prethodnom poglavlju (a prije svega teleološke i evolucionističke argumente, imajući u vidu i načelo efikasnosti) Sud konstantno proširuje,

pročišćava i redefiniše obim prava koje Konvencija štiti. Od prava koja član 6, st. 1. izričito pominje, poput prava na pravičnu i javnu raspravu, prava na nepristrasan i nezavistan sud i prava na suđenje u razumnom roku, Sud je svojom praksom kreirao čitav niz preciznijih, ali vrlo opipljivih i važnih procesnih prava i na taj način znatno "razvio" izvorni tekst Konvencije.

Osim toga, većinu termina iz člana 6, poput termina "građanska subjektivna prava i obaveze", termina "tribunal" i termina "ustanovljen na osnovu prava" Sud tumači u skladu s principom autonomnog značenja termina iz Konvencije, koji je opisan u prethodnom poglavlju, i time na najbolji način omogućava sprovođenje načela efikasnosti u primjeni Konvencije.

Od onih prava koja štiti član 6. st. 1 u procesnom smislu svakako je "prvo" pravo – pravo na sud. Ono, najprije, obuhvata univerzalno pravo na pristup sudu, koje nije izričito utvđeno odredbom iz stava 1. člana 6. ali ga je Sud prvi put priznao u odluci Golder v. the United Kingdom (4451/70), kada je zauzeo stav da bi sve procesne garancije koje taj član pruža bile beskorisne ukoliko najprije ne bi postojala mogućnost ("pravo") da se uopšte započne sudski proces. To konkretno znači da pojedincu mora da se omogući da svoj slučaj iznese pred nadležni sud na rješavanje bez nepotrebnih i neprimjerenih pravnih ili praktičnih prepreka. Nadalje, ono u krivičnim stvarima uvijek, a u građanskim ponekad podrazumijeva i obavezu države ugovornice da, ukoliko je to neophodno da bi pravo na pristup sudu bilo djelotvorno, pojedincu obezbijedi stručnu pravnu pomoć.[39] Takođe, pravo na pristup sudu obuhvata i pravo na pravosnažnost sudskih odluka[40] kao i pravo na izvršenje pravosnažne sudske odluke. [41]

Kako Sud naglašava, to pravo jeste sastavni dio prava na pristup sudu jer bi u suprotnom odredba stava 1. člana 6. bila nedjelotvorna, to jest lišena bilo kakvog stvarnog pozitivnog dejstva.[42]

"Drugo" ključno pravo iz člana 6. st. 1. je pravo na "pravičnu i javnu raspravu". Iz njega je takođe Sud, kroz svoju jurisprudenciju, izveo niz drugih "podprava" ili prava koja su njegov sastavni dio. Najprije, kada je riječ o "pravičnosti" rasprave, ona se odnosi na postupak u cjelini, a ne samo na usmeno saslušanje stranaka ili na prvostepeni postupak.[43] To znači da propust ili kršenje nekog prava u jednoj fazi postupka ne mora da ima odlučujući uticaj na procjenu da li je pravo podnosioca predstavke prekršeno, ukoliko je taj propust ispravljen u kasnijoj fazi postupka. A kao što je već pomenuto, pitanje da li je postupak bio "pravičan" je sasvim odvojeno od pitanja da li je odluka nacionalnog suda "ispravna" ili "pogrešna". Takođe, Sud je u pojedinim svojim odlukama zaključio da "pravičnost" rasprave podrazumijeva i štaviše zahtijeva adverzijalnost samog postupka, što znači da svakoj strani treba dati priliku da se upozna s dokazima i argumentima koje

39) Airey v. Ireland, 6289/73, § 26.

40) Brumărescu v. Romania, 28342/95, § 60–65.

41) Hornsby v. Greece, 18357/91, § 40–45.

42) Burdov v. Russia, 59498/00, § 34 i 37.

43) Monnell and Morris v. the United Kingdom, 9562/81, 9818/82, § 56.

iznosi suprotna strana kao i da iznese primjedbe na te dokaze i argumente.[44] Logična "dopuna" principa adverzijalnosti je još jedno važno proceduralno pravo ili princip - takozvana "jednakost oružja."[45] Taj princip nalaže da svakoj stranci u postupku treba pružiti jednaku mogućnost da izloži svoj "slučaj", odnosno da predoči sopstvene argumente i dokaze koji joj idu u prilog i da u tom smislu ne bude u podređenom položaju u odnosu na suprotnu stranu. Ukratko, princip "jednakosti oružja" odražava formalnu jednakost strana u postupku pred sudom.[46]

Kada je riječ o "javnosti rasprave" u njoj se, prema sudskoj praksi Suda mogu prepoznati četiri bitna elementa: prvi je pravo strana da budu prisutne na raspravi pred sudom;[47] drugi je efektivno mogućnost stranaka da učestvuju u raspravi; treći aspekt javnosti rasprave odnosi se na opšti javni karakter rasprave, to jest na generalno prisustvo javnosti,[48] koje se može isključiti samo iz razloga koji su izričito navedeni u prvom stavu člana 6. Konvencije; četvrti element je obaveza suda da svoju presudu učini javnom. Najzad, može se reći da jednim svojim dijelom[49], taj posljednji element obuhvata i pravo na obrazloženu presudu.[50]

Tako na kraju ovog odjeljka posvećenog članu 6. dolazimo i do prava na obrazloženu presudu. Iznijećemo samo nekoliko napomena o ovom pravu, kao uvod u dio teksta koji je posvećen analizi presuda Suda u kojima se utvrđuje da je ovo pravo povrijeđeno. Analiziraju li se pažljivije prava koja su upravo prikazana, a koja proističu iz člana 6. st. 1, može se primijetiti da se Sud u Strazburu učestalo bavi formalnim ispitivanjem poštovanja garancija navedenih u tom članu. Međutim, utvrđujući da je sastavni dio prava na pristup sudu i na odluku domaćeg suda o tome da li je podnosiocu predstavke neko pravo povrijeđeno ili nije i pravo na obrazloženu presudu, Sud zapravo procjenjuje da li je određena presuda nacionalnog suda, kao takva, protivna pravu na pravično suđenje, uprkos tome što su tokom postupka sve proceduralne garancije poštovane.[51]

Pravo stranke u postupku na obrazloženu sudsku odluku je pravo na poznavanje bitnih razloga i jasno obrazloženih stavova suda o činjeničnim i pravnim pitanjima a na osnovu kojih je presuda donijeta.[52] Nije, naime, dovoljno da je stranka samo upoznata s odlukom suda, to jest s konačnom presudom, nego je sud dužan da obrazloži, odnosno da pruži argumente zbog kojih je donio baš takva presudu. Ukoliko nije tako, stav Suda u Strazburu je da je država povrijedila pravo građanina na pravično suđenje iz člana 6. Konvencije, a da je onemogućeno i korišćenje građaninu i jednog specifičnog prava iz člana 6, prava na pristup sudu zbog praktične nemogućnosti stranke da djelotvorno koristi pravni lijek, jer samo obrazložena

44) Karpenko v. Russia, 5605/04, § 90.

45) Brandstetter v. Austria, 11170/84, 12876/87, 13468/87, § 41–69.

46) Neumeister v. Austria, 1936/63.

47) Ekbatani v. Sweden, 10563/83, § 24–33.

48) Riepan v. Austria, 35115/97, § 27–41.

49) Kažemo "jednim svojim dijelom", budući da se pravo na obrazloženu presudu djelimično smatra i derivatom prava na pristup sudu.

50) Hadjianastassiou v. Greece, 12945/87;
Van de Hurk v. the Netherlands, 16034/90.

51) Može se reći da je uspostavljanjem prava na obrazloženu presudu Sud u Strazburu došao u poziciju da u sporovima u kojima je ovo pravo prekršeno, prilikom donošenja svoje odluke odstupa od doktrine "četvrte instance", jer tom prilikom neizbježno zalazi u način na koji nacionalni sud obrazlaže rešenja pojedinih pravnih i faktičkih pitanja i time ponekad nužno razmatra i sam kvalitet tih rešenja, a ne samo njihovog obrazloženja.

52) Ruiz Torija v. Spain, 1994, § 29-30.

sudska odluka omogućava da viša instanca – revizioni sud – može da ispita ispravnost postupanja nižeg suda, odnosno da ispita način na koji je niži sud donio presudu te da provjeri logičku koherentnost i opravdanost zaključaka nižeg suda povodom relevantnih faktičkih i pravnih pitanja konkretnog spora.

U teoriji je prihvaćeno mišljenje[53] da obaveza obrazlaganja sudskih odluka zapravo predstavlja garanciju "pravičnog suđenja", jer obezbjeđuje (a) kvalitet odluke – obaveza valjanog obrazlaganja je podstrek i svojevrsni "pritisak" na sud da ispravno odlučuje i što bolje opravdava i obrazlaže svoje odluke, (b) informaciju o tome zbog čega je odluka donijeta, a na osnovu koje stranke mogu donijeti odluku hoće li je i u kojim pravcima pobijati pravnim lijekom, te (c) potvrdu časti i dostojanstva subjekta o čijim pravima se odlučuje.[54]

Na samom kraju ovog poglavlja treba naglasiti sljedeće: sadržaj prava na obrazloženu presudu treba razlikovati od sadržaja sâmog obrazloženja presude, a prema standardima valjanog obrazloženja koje je vremenom, kroz svoju praksu, uspostavio Sud u Strazburu. U ovom poglavlju, još jednom ćemo to naglasiti, pažnja je bila posvećena prije svega prvom pitanju. O drugom i centralnom pitanju ovog teksta, biće više riječi u narednom poglavlju.

53) O tome više up. Denis J. Galligan, Due process and Fair Procedures: A Study of Administrative Procedures, London: Clarendon Press, 1996, str. 431 i dalje.

54) Tadija Bubalović, "Pravo optuženika na obrazloženu sudsku odluku", Zbornik Pravnog Fakulteta u Zagrebu, br. 64, 2014, str. 991-992.

POGLAVLJE IV

Obrazložena presuda u praksi Evropskog suda za ljudska prava

1. Uvod

U prethodnom poglavlju je naglašeno da Sud u Strazburu, slijedeći doktrinu četvrtog stepena, ne razmatra navodne greške u utvrđivanju činjenica ili tumačenju prava počinjene od strane nacionalnih tribunala. Nacionalni tribunali nezavisno procjenjuju dokaze koji su im predočeni i nezavisno tumače i primjenjuju domaće pravo.[55] Istovremeno, Sud drži da ispravna pravosudna djelatnost u smislu prava na obrazloženu presudu podrazumijeva da presude tribunala moraju na adekvatan način da izlože razloge na kojima su zasnovane.[56]

Pravo na obrazloženu presudu – pravo na poznavanje bitnih razloga i jasno obrazloženih stavova tribunala o činjeničnim i pravnim pitanjima a na osnovu kojih je presuda donijeta – zasnovano je na principu na kojem se zasniva i sama Konvencija, a koji se tiče zaštite pojedinca od proizvoljnog (arbitrarnog) presuđivanja, koji se može izvesti iz principa vladavine prava. Oba principa u pravosudnoj sferi služe tome da očuvaju povjerenje javnosti u objektivan i transparentan pravosudni sistem, što je jedan od osnova demokratskog društva[57]. Upravo u tom smislu se obrazloženost u praksi Evropskog suda za ljudska prava shvata prvenstveno kao izričito navođenje razloga za presudu u samoj presudi, i to navođenje onih razloga koji su dovoljni da odgovore na bitne faktičke i pravne argumente stranke, bilo da su oni supstantivni, bilo da su proceduralni.

Interpretativni rad Suda u Strazburu kojim je formulisano pravo na obrazloženu presudu doveo je i do značajnog broja presuda u kojima je razrađen koncept dobrog obrazloženja u smislu člana 6. stava 1. Konvencije.[58] Sam Sud navodi razloge zbog kojih pravo na obrazloženu presudu proizilazi iz smisla i svrhe člana 6. stava 1 konvencije: (1) odluka mora jasno pokazati strankama da su saslušane i upravo obrazloženje ukazuje na to da li su stranke imale pravično suđenje; (2) dobro obrazložena odluka omogućava žalbu protiv odluke - odluka koja ne sadrži valjano izložene razloge ne daje mogućnost strankama da je ospore u odgovarajućem postupku; (3) kao što strankama omogućava ulaganje pravnog lijeka, obrazložena odluka omogućava i revizionom organu sprovođenje postupka kontrole; konačno (4) samo obrazložena odluka omogućava javnosti razmatranje djelovanja i odlučivanja sudova i javnih vlasti uopšte.[59]

55) Cornelis v. The Netherlands, 994/03.

56) Suominen v. Finland, 37801/97, § 36.

57) Taxquet v. Belgium 926/05, § 90.

58) Treba pritom imati na umu da je član 6. stav 1. Konvencije, na osnovu prakse Suda u Strazburu primjenljiv 1) uvijek onda kada postoji istinski i ozbiljan spor o "građanskim pravima i obavezama", i to ne samo u pogledu postojanja tih prava već i u pogledu njihovog obima, i b) kada je ishod postupka direktno uticao na prava i obaveze; nije dakle dovoljno da je odluka posredno uticala na prava i obaveze (Chevrol v. France, 49636/99, §

59) Tatishvili v. Russia 1509/02, § 58.

Kriterijume obrazloženog presuđivanja je upravo na osnovu prakse Suda u Strazburu moguće sistematizovati i izložiti kao standarde o kojima bi svaki sudija u okviru nacionalnog pravnog sistema morao da vodi računa prilikom presuđivanja i prilikom formulisanja presude, a na osnovu kojih bi se presude mogle cijeniti bez zadiranja, u strogom smislu te riječi, u meritum spora. U nastavku teksta ćemo definisati subjekte obaveze obrazloženog presuđivanja da bismo nakon toga utvrdili sadržinu obaveze obrazloženog presuđivanja.

2. Subjekti obaveze obrazloženog presuđivanja: pojam tribunala i status odluka tribunala

Pojam tribunala je temeljan za ispravno razumijevanje člana 6. stava 1. Konvencije, kao što je temeljan i za razumijevanje prava na obrazloženu presudu. Sud u Strazburu je određenje tribunala formulisao autonomno – nezavisno od nacionalnih doktrina i praksi. U slučajevima *Sramek v. Austria* (8790/78, § 36), *H. v. Belgium* (8950/80, § 50), *Belilos v. Switzerland* (§ 50), *Benthem v. the Neatherlands* (§ 40) načelno je riješeno pitanje određenja tribunala koji je subjekat obaveze obrazloženja.

Tribunal u supstancijalnom smislu – u smislu koji je ključan za praksu Suda – karakteriše prije svega pravosudna funkcija, koja podrazumijeva odlučivanje o pitanjima iz nadležnosti institucije na osnovu pravnih pravila nakon sprovođenja propisane procedure. Tribunali, dakle, nisu samo oni organi koji se u nacionalnim pravim sistemima izričito označavaju kao sudovi. Obrazloženja pomenutih presuda potvrdila su da se pod tribunalom podrazumijevaju svi oni organi koji ispunjavaju određene uslove koji su predviđeni bilo Konvencijom bilo praksom Suda, bez obzira na to kako su označeni u okviru nacionalnog prava. Dodatno, presudom Van der Hurk v. The Netherlands (16034/90, § 45.) Sud je ustanovio i to da pojam tribunala nužno podrazumijeva "mogućnost donošenja obavezujuće odluke koja ne može biti izmijenjena od strane nesudskog organa". Da bi se smatrala tribunalom, institucija mora imati moć da donosi obavezujuće odluke; institucije koje imaju savjetodavne funkcije ili daju mišljenja ne ispunjavaju taj uslov.[60]

Obavljanje pravosudne funkcije i obavezujući karakter odluka prema stavu Suda u Strazburu ipak nisu dovoljni da bi se jedna institucija smatrala tribunalom u smislu Konvencije. Sama Konvencija propisuje određene kvalitete tribunala koje Sud nerijetko tumači upravo kao karakteristike u odsustvu kojih se jedna institucija ne može ni nazvati tribunalom. Ti uslovi su: (1) ustanovljenost zakonom, (2) nezavisnost i (3) nepristrasnost.[61]

60) Sramek v. Austria, § 36-42; Benthem v. The Netherlands, § 40.

61) U praksi Suda se nezavisnost, nepristrasnost i ustanovljenost zakonom nekada navode kao kriterijumi koje tribunal treba da ispunjava, a nekada se navode kao kriterijumi koje institucija treba da ispuni da bi uopšte imala status tribunala. Za potrebe ovog rada navedene karakteristike su shvaćene kao nužni uslovi koje svaka institucija koja pretenduje na status tribunala mora da ispuni.

Pojam tribunala ustanovljenog zakonom podrazumijeva da (a) organ ne smije biti ustanovljen na osnovu diskrecije izvršne vlasti,[62] (b) nadležnost institucije mora biti ustanovljena zakonom, tj. da nije dovoljno da je ustanovljena običajima. Institucija koja nije ustanovljena u voljom zakonodavnog tijela, ističe se izričito u presudu Pandjikidze et al. v. Georgia (§ 103-111) nužno je lišena legitimiteta koji se zahtijeva u demokratskom društvu.

S obzirom na supstantivno određenje tribunal koje Sud koristi, kriterijumima nezavisnosti, nepristrasnosti i ustanovljenosti zakonom iz člana 6. stava 1. Konvencije podliježu i oni organi koji nisu sudovi, ali u supstancijalnom smislu obavljaju sudijsku funkciju sapravno ispitujući sva činjenična i pravna pitanja koja su relevantna za konkretan slučaj. Slijedeći to supstancijalno određenje pojma Sud je u toku svoje prakse status tribunala pripisivao institucijama koje se tradicionalno ne smatraju pravosudnim kakve su: advokatske komore,[63] vojni i zatvorski disciplinski organi,[64] regionalni administrativni organi za prenos vlasništva na nepokretnostima,[65] organi za prodaju zemljišta,[66] organi za zemljišnu reformu,[67] komisije za rješavanje pitanja u šumarstvu.[68] Pritom za Sud nije značajno da li uz pravosudnu funkciju institucija obavlja i druge funkcije; značajno je samo to da je u konkretnom slučaju koji se raspravlja njegova funkcija bila pravosudna u gorepomenutom smislu.

Nezavisnost i nepristrasnost tribunala su međusobno povezani i ispreplетani kriterijumi. U slučajevima kakav je npr. Kleyn et al. v. the Netherlands (39343/98, 39651/98, 43147/98, 46664/99) ta dva kriterijuma se razmatraju jedinstveno. Da li je tribunal nezavisan cijeni se na osnovu: načina imenovanja članova, mandata članova, postojanja garancija za isključenje spoljnih pritisaka i na osnovu javnog predstavljanja jednog organa kao nezavisnog.[69] Nepristrasnost tribunala uključuje subjektivnu dimenziju – koja podrazumijeva da članovi tribunala treba da budu slobodni od ličnih predrasuda, i objektivnu dimenziju – koja podrazumijeva da organ mora u dovoljnoj mjeri biti prikazan kao nezavisan (appearance of impartiality) i da garancije nezavisnosti u svakom konkretnom slučaju moraju biti takve da isključuju opravdanu sumnju u nezavisnost.

U neobično važnom slučaju Chevrol v. France (49636/99) podnosilac predstavke je tvrdio da nije imao pravo na tribunal u smislu člana 6. stava 1. Konvencije, pa se Sud pozabavio tumačenjem svoje prakse u slučaju Beaumartin v. France (15287/89). Upravo po Beumartin presudi, tribunalom se može smatrati samo institucija koja ima punu nadležnosti i ispunjava dodatne uslove nezavisnosti od izvršne vlasti i nepristrasnosti prema strankama (§ 38). U presudi Chevrol će sud precizirati da se izraz "puna

62) Lavents v. Latvia, 58442/00.

63) H. v. Belgium, 8950/80.

64) Engel et al. v. the Netherlands, 5100/71; 5101/71; 5102/71; 5354/72; 5370/72.

65) Sramek v. Austria, 8950/80.

66) Ringeisen v. Austria, 2614/65.

67) ETTL et al. v. Austria, 9273/81.

68) Argyrou et al. v. Greece, 10468/04.

69) Langborger v. Sweden, 11179/84, § 32;
Kleyn etal. v. the Netherlands, 39343/98, 39651/98, 43147/98, 46664/99, § 190.

nadležnost" odnosi na konkretan slučaj koji se pred institucijom razmatra (§ 76, 77). Takvo određenje tribunala je u slučaju *Van de Hurk v. the Netherlands* (16034/90) dovelo do toga da Sud utvrdi i princip neprikosnovenosti sudske presude. Ovlašćenje kojim se nekom drugom državnom organu na nacionalnom nivou daje pravo da, u cjelini ili djelimično, mijenja dejstvo sudskih odluka smatra se kršenjem prava na pravično suđenje i ograničenjem nezavisnosti suda. Sam pojam tribunala iz člana 6, stava 1 Konvencije prema stavu Suda nužno podrazumijeva da obavezujuća odluka ne može biti izmijenjena od strane organa koji nije sud.

To nas konačno dovodi i do određenja pojma tribunala, tj. do određenja subjekta obaveze obrazložene presude, kao i do određenja statusa odluka institucija koje se smatraju tribunalima u praksi Suda:

– Tribunal je organ koji obavlja pravosudnu funkciju nezavisno od izvršne vlasti i nepristrasno u odnosu na stranke u sporu, čija je funkcija da na obavezujući način odluči o pitanjima u okviru svoje nadležnosti na osnovu pravnih pravila, nakon procedure koja je sprovedena u skladu sa zakonom.

– Dejstvo sudske odluke ne može ni u cjelini niti djelimično biti promijenjeno od strane nekog drugog državnog organa, te se ne može pravnim aktom ustanoviti ovlašćenje da državni organ u cjelini ili djelimično mjenja dejstvo sudskih odluka.

Naravno, izloženom stanovištu Suda o neprikosnovenosti odluke tribunal nikako ne treba apsolutizovati. Odluka tribunala je neprikosnovena u pogledu mogućnosti preinačenja ili poništenja od strane organa izvršne vlasti, ali ne i u pogledu ocjene i slobodne kritičke diskusije u javnosti. Obrazložena sudska presuda, a o tome će u nastavku biti više riječi, jeste važna upravo zato da bi se praksa tribunala na osnovu razloga koji su izloženi u presudama mogla javno procjenjivati, što uspostavlja i održava povjerenje javnosti u nacionalno pravosuđe.

3. Sadržaj obaveze obrazloženog presuđivanja

3.1. Obaveza davanja razloga

Prva i najvažnija obaveza koju je Sud u Strazburu utvrdio u vezi s pravom na obrazloženu presudu tiče se imperativa da presude tribunalā budu adekvatno obrazložene u smislu izričitog navođenja razloga na kojima se zasnivaju. Nacionalni tribunali nisu obavezni da detaljno odgovore na svaki argument stranaka u postupku,[70] ali Konvencija obavezuje sudove da daju dovoljne razloge za svoje odluke.[71]

70) Hiro Balani v. Spain, 18064/91, § 27; Gorou v. Grece 12686/03, § 37.

71) Ruiz Torija v. Spain, 18390/91, § 29, Van de Hurk v. the Netherlands, 16034/90, § 61, Gorou v. Grece, 12686/03, § 37.

Prvi standard obrazloženog presuđivanja stoga glasi:

• Tribunali su obavezni da navedu odgovarajuće i dovoljne razloge za odluke, to jest dužni su da opravdaju svoje radnje obrazlažući svoje odluke.

Koji se pak razlozi smatraju odgovarajućim? Odgovor na to pitanje u značajnoj mjeri zavisi od prirode odluke i cijeni se na osnovu okolnosti svakog pojedinačnog slučaja[72] uz uvažavanje razlika koje postoje u državama koje su ratifikovale konvenciju u pogledu zakonskih odredaba, običajnih pravila, pravnih stanovišta kao i razlika u prezentaciji i izradi presuda.[73]

U značajnom broju presuda Sud je tu obavezu tribunala na nacionalnom nivou povezao s pravom na pravni lijek i s mogućnošću javne ocjene odluke i njenog sadržaja. Samo je obrazložena odluka podložna reviziji[74] i javnoj ocjeni.[75] Dodatno, neophodno je da odluka na odgovarajući način bude zasnovana na nacionalnom pravu. Podnosilac predstavke je u slučaju Tatishvili v. Russia naveo da je njegovo pravo na slobodu kretanja i slobodu da izabere prebivalište (član 2. Protokol 4.) povrijeđeno time što je ruska policija odbila zahtjev za prijavu prebivališta, praćen odgovarajućim dokumentima. U odsustvu prijave boravišta, podnosilac predstavke je iseljen, a odluku o iseljenju su sudovi na nacionalnom nivou potvrdili, uprkos tumačenju Ustavnog suda Ruske federacije. Upravni organ i nacionalni sudovi nisu, dakle, postupili u skladu s nacionalnim pravom, a pod nacionalnim pravom se svakako podrazumijeva i obavezujuće tumačenje Ustavnog suda. Odlučeno je da postoji povreda člana 6. stav 1. Konvencije, upravo zbog toga što nacionalni sudovi, uprkos tome što imaju određenu slobodu u odabiru argumenata i ocjeni dokaza, imaju takođe i obavezu da opravdaju svoju odluku, tj. da daju argumente u prilog svojoj odluci kako bi stranke mogle ostvariti pravo na pravni lijek i kako bi javnost mogla da razumije osnove odluke. Iz prethodnog proizlazi sledeći standard obrazloženog presuđivanja:

• Razlozi na kojima je presuda zasnovana jesu odgovarajući ako a) omogućavaju strankama da efektivno iskoriste pravo na pravni lijek i b) ako su zasnovani na važećem nacionalnom pravu.[76]

Sud je u slučaju *Barać et al. v. Montenegro* (47974/06) utvrdio prekršaj člana 6. stava 1. i presudio protiv Crne Gore upravo zbog toga što odluka suda nije bila zasnovana na važećem nacionalnom pravu. Podnosioci predstavke su u tom slučaju 2005. godine podnijeli tužbu protiv svog poslodavca za isplatu zimnice. Osnovni sud u Danilovgradu je 2006. godine presudio u njihovu korist i dosudio svakome po 150 eura i troškove postupka. Viši sud u Podgorici je 26. aprila iste godine ovu presudu poništio, i naložio solidarnu

72) Hirvisaari v. Finland 49684/99, § 30, Tatishvili v. Russia 1509/02, § 58.

73) Gorou v. Greece, 12686/03, § 37; Ruiz Torija v. Spain, 18390/91, § 29; Hiro Balani v. Spain, 18064/91, § 27.

74) Hirvisaari v. Finland, 49684/99, § 30.

75) Suominen v. Finland, 37801/97.

76) O tome da praksa Suda u ovom pogledu još uvijek nije ustaljena, te da u okviru Suda postoje inicijative da se pravo na obrazloženu presudu shvati šire, govore i izdvojena mišljenja u slučaju Gorou v. Greece u kojima se navodi da čak i organi od kojih zavisi pokretanje postupka po pravnom lijeku pred revizionim sudovima, moraju da daju obrazložene odgovore na zahtjeve stranaka. U pomenutom slučaju sporni odgovor jeste rezultat činjenice da Grčki pravni sistem čini postupke pred Kasacionim sudom zavisnim od diskrecije javnog tužioca, a da javni tužioci na zahtjeve stranaka za pokretanjem postupka pred Kasacionim sudom često odgovaraju bez navođenja razloga, lapidarnim tekstom ručno ispisanim na papiru (djelimično nesaglasno izdvojeno mišljenje sudije Giorgio-a Malinverni-ja, kome se pridružuje sudija András Sajó, § 5). Izdvojena mišljenja su naglasila da je ustanovljavanjem nepostojanja povrede prava na obrazloženu presudu Sud u ovom slučaju umanjio obim fundamentalnih prava i postupio suprotno svojoj ustaljenoj praksi.

isplatu troškova postupka tuženom poslodavcu u iznosu od 900 eura, pozivajući se na Zakon o izmjenama i dopunama Zakona o radu iz 2004. Ustavni sud je februara 2006. godine taj Zakon proglasio neustavnim, a odluka je objavljena 18. aprila 2006. U septembru 2006. godine Vrhovni sud je odbacio zahtjev za reviziju. Podnosioci predstavke su novembra 2006. podnijeli predstavku Sudu ističući upravo to da se pravosnažna presuda protiv njih zasnivala na zakonu koji nije bio na snazi. Razlog na osnovu kojeg je Viši sud presudio nije bio zasnovan na važećem nacionalnom zakonodavstvu, pa je Sud utvrdio da je povrijeđeno pravo na obrazloženu presudu.

3.2. Ispravljanje manjkavosti u argumentaciji

Sam kvalitet razloga jeste, načelno, u domenu slobode nacionalnih sudova da tumače pravo i ocjenjuju dokaze. U okviru svakog pojedinačnog nacionalnog pravnog sistema argumentacija sudova koja rezultira odlukom jeste podložna reviziji od strane viših sudova. Po pravilu, revizioni sud može u potpunosti podržati razloge koji su u prilog određene odluke iznijeti od strane prvostepenog ili drugostepenog suda. Revizioni sudovi, naime, mogu prosto primijeniti određenu pravnu odredbu kako bi odbili pravni lijek kojim se ističu pravni nedostaci koji nemaju nikakvu šansu da uspiju u žalbenom postupku. Praksa revizionih sudova na nacionalnom nivou o kojoj je riječ, potvrđena je brojnim presudama Suda u Strazburu.[77]

77) Salé v. France, 39765/04, § 17, Burg et al. v. France, 34763/02, Gorou v. Greece, 12686/03, § 41.

Ipak, u odluci *Hirvisaari v. Finland* (49684/99, § 30-33) Sud je, s obzirom na okolnosti konkretnog slučaja, odstupio od n-ačelnog stava da revizioni sud može odbiti žalbu tako što će bezrezervno podržati razloge koji su dati u odluci nižeg suda. Izuzetak o kojem je riječ tiče se upravo činjenice da niži sud svoju odluku može zasnovati na protivrječnoj i nekonzistentnoj argumentaciji. Kada je to slučaj Sud zauzima stav da se revizioni sud mora izjasniti o tim neodgovarajućim, protivrječnim i nekonzistentnim razlozima, i da mora navesti sopstvene razloge za odluku, bez obzira na to da li odluka revizionog suda podržava ili ukida prvostepenu odluku. U skladu s tim se može formulisati i posebna obaveza revizionih sudova u kontekstu prava na obrazloženu presudu:

- Revizioni tribunali su obavezni da isprave manjkavosti u argumentaciji nižih sudova ako je jedan od osnovnih navoda stranke u revizionom postupku taj da je argumentacija prvostepenog tribunala neodgovarajuća, nekoherentna ili protivrječna.

Pravo revizionog suda da bezrezervno podrži razloge koji su navedeni u odluci nižeg suda ograničeno je, dakle, logičkim kvalitetima argumentacije, tj. logičkim vezama između razloga na kojima se zasniva odluka nižeg

suda, uzimajući u obzir činjenicu da u revizionom postupku osnovni argument stranke može biti upravo taj da je rasuđivanje prvostepenog tribunal prima facie kontradiktorno.

U pogledu postupanja revizionih sudova valja imati na umu i to da nacionalno zakonodavstvo može propisati obaveze koje su strože od izričitih obaveza koje proizlaze iz Konvencije i prakse Suda u Strazburu u vezi sa članom 6. U slučaju *Hiro Balani v. Spain* (18064/91), Sud upravo zauzima stanovište da je na osnovu Zakona o građanskom postupku Španije (član 1715) Vrhovni sud obavezan da meritorno presudi – što podrazumijeva razmatranje svih materijala koji su podnijeti u toku postupka pred nižim sudom – i onda kada ti materijali nisu izričito navedeni u žalbi (§ 28), izuzev kada je riječ o "pukim formalnim ili proceduralnim pitanjima" (§ 18).

• Revizioni tribunali se po pravilu moraju izjasniti o ključnim podnescima stranaka ukoliko su oni bili predmet rasprave u prvom stepenu, bez obzira na to da li su izričito navedeni prilikom ulaganja pravnog lijeka, a ćutanje revizionog tribunala se ne može tumačiti kao prećutno odbijanje prigovora.

Nacionalni pravni sistem može, a često i treba, da precizira uslove za obrazloženu presudu koji se postavljaju kako prevostepenim, tako i revizionim sudovima. U obrazloženju pomenutih presuda se u tom smislu upravo i navode odredbe iz člana 130, stava 3. Ustava Španije kojima se precizira obaveza obrazložene presude: Presude sadrže iskaze o razlozima na kojima su zasnovane i biće javno izrečene. U članu 359 Zakona o građanskom postupku Španije navodi se: "Presude moraju biti jasne i precizne i moraju se odnositi na podneske i druge tvrdnje koje su iznijete u toku postupka; moraju navesti razloge za i protiv tuženog i odlučiti po svim osporavanim tačkama koje su bile predmet argumentacije". Te tačke se moraju posebno obraditi u presudi. Riječ je, dakle, o primjerima zakonodavne prakse koji mogu poslužiti kao uzor za zakonsko preciziranje obaveza sudova i tribunala uopšte u nacionalnom pravnom sistemu Crne Gore. Član 120 Ustava Crne Gore propisuje, doduše, javnost rasprave pred sudom i izricanja presude, ali se obrazloženje presude ne pominje izričito. Sud u Strazburu izričito navodi da se član 6 Konvencije tumači na taj način da javnost presude nužno podrazumijeva obrazloženu presudu, pa bi i obavezu javnosti rasprave i izricanja presude iz navedenog člana Ustava Crne Gore trebalo tumačiti u tom svijetlu.

3.3. Neodređeni pravni pojmovi i razumljivost presude

Formulacija presude, ističe se u slučaju *Lalmahomed v. The Netherlands* (26036/08, § 43), mora da bude dovoljno jasna, jer je to odlučujuće za zaštitu od arbitrarnosti na kojoj se pravo na obrazloženu presudu zasniva. U slučaju *Taxquet v. Belgium* (926/05) sud je ocijenio da su pitanja poroti "formulisana na taj način da nije moglo biti utvrđeno zašto je na svako od pitanja dat pozitivan odgovor" (§ 63), što ukazuje na obavezu tribunala da svoje razloge formuliše na jasan način. Takvi lakonski odgovori na opšta pitanja u slučaju porotnog suđenja i nedovoljno obrazloženi stavovi u slučaju odluka tribunala prema stavu Suda u Strazburu mogu opravdano dovesti do toga da stranke u postupku steknu utisak o arbitrarnosti usled nedostatka transparentnosti. Usled toga je u Taxquet slučaju odlučeno da ni odluka nije sadržala razloge na osnovu kojih bi podnosilac predstavke mogao da razumije i da je prihvati.[78]

Pravo na obrazloženu presudu ne uključuje, stoga, samo obavezu izlaganja razloga na kojima se presuda zasniva, već je te razloge neophodno izložiti s "dovoljnom jasnoćom".[79] To uostalom proizlazi iz principa na kojima je pravo na obrazloženu presudu zasnovano – iz vladavine prava i izbjegavanja arbitrarnog vršenja vlasti koji omogućavaju uspostavljanje i održavanje javnog povjerenja. U slučaju *Suominen v. Finland* (37801/97) naglašava se da jedino obrazložena presuda, tj. presuda potkrijepljena odgovarajućim razlozima može biti predmet javne ocjene (§ 37); u presudi Tatishvili v. Russia (1509/02) da je jedna od osnovnih funkcija prava na obrazloženu presudu ta da omogući javnu provjeru presude (§ 58). To je dakako moguće samo ako je presuda obrazložena na razumljiv način.

• Presuda mora biti formulisana dovoljno jasno da javnost može da je razumije u mjeri koja je neophodna radi održavanja povjerenja javnosti u pravosuđe.

Presude zasnovane na pravnim standardima koji na odgovarajući način nisu precizirani bilo u normativnim dokumentima, bilo u praksi nacionalnih tribunala su predstavljale osnov za odluku Suda kojom se utvrđuje povreda prava na obrazloženu presudu u slučaju H. v. Belgium. Podnosilac predstavke u ovom slučaju je belgijski advokat, koji je isključen iz komore u Antverpenu pošto je u okviru disciplinskog postupka utvrđeno kako je jednom od klijenata dao lažne informacije o slučaju, kako bi sebi pribavio neposrednu imovinsku korist. Apelacioni i Kasacioni sud u Briselu su u postupku po pravnim lijekovima koji je podnosilac predstavke naknadno poveo potvrdili ovu odluku. Podnosilac predstavke se potom u dva navrata u razmaku od nekoliko godina obraćao komori sa zahtjevom da bude

78) Odluka je od posebnog značaja i zbog toga što dovodi u pitanje učešće laičke porote u presuđivanju. Sud izričit da njegov zadatak nije standardizacija različitih pravnih sistema u okviru zemalja članica Savjeta Evrope, odlučeno je da je u konkretnom slučaju (a sud uvijek nastoji da se distancira od apstraktne ocjene zakonodavstva i institucionalnih aranžmana), i dosljedan u tome da se od porotnika ne može tražiti da daju razloge za njihovu odluku (Taxquet v. Belgium, § 90)

79) Hadjianastassiou v. Greece, 12945/87, § 33.

ponovo primljen, odnosno uvršten u spisak advokata, ali je u oba navrata odbijen. Ponovni prijem jeste po relevantnim belgijskim propisima moguć nakon proteka 10 godina od datuma isključenja i ako se ispune "izuzetne okolnosti". Sud je u tom slučaju zauzeo stanovište da neprecizan karakter navedenog zakonskog pojma onemogućava da se na njemu bez odgovarajućeg obrazloženja zasnuje odluka, tj. onemogućava da se odluči samo na osnovu pravnog standarda. U slučaju *Jovanović v. Serbia* (32299/08, § 50), koji se prvenstveno tiče prava na pristup sudu, Sud je takođe istakao da "propisani elementi moraju biti dovoljno razvijeni i transparentni u praksi kako bi obezbjedili pravnu i proceduralnu sigurnost".

• Neodređeni pravni pojmovi (pravni standardi) koji nisu na odgovarajući način razrađeni u odluci, normativnim dokumentima ili u sudskoj praksi, pa se ne može sa sigurnošću utvrditi njihova sadržina, imaju ograničeno dejstvo u postupku u tom smislu da se odluka ne može u potpunosti zasnovati na njima.

3.4. Potpunost presude i obavezni argumenti

Interpretacija nacionalnog zakonodavstva nije zadatak ESLJP-a već je zadatak sudova na nacionalnom nivou, izuzev u onim slučajevima u kojima postoji "očigledna arbitrarnost",[80] ali jeste zadatak Suda da utvrdi da li su interpretacije domaćeg zakonodavstva u skladu s Konvencijom.[81] Upravo se u tom smislu i može se očekivati da će Sud smatrati da je povrijeđeno pravo na obrazloženu presudu ako nacionalni sud nije odgovorio na određene argumente stranaka, ili ako nije naveo pojedine tačno određene razloge u obrazloženju presude.

Uprkos više puta istaknutoj činjenici da nacionalni sudovi nisu obavezni da odgovore na sve argumente stranaka u sporu, Sud u Strazburu je u više navrata naglasio da sudovi, uzimajući u obzir okolnosti konkretnog slučaja, imaju obavezu da samom presudom učine jasnim da su sva suštinska pitanja razmotrena.[82] U slučaju *Lalmahomed v. The Netherlands* (26036/08, § 37) Sud je podržao stav iz presude *Monnell and Morris v. the United Kingdom* (9562/81, § 69 i 9818/82) da odluka mora biti zasnovana na punoj i temeljnoj procjeni pitanja koja su ključna za donošenje odluke. Iz navedenih stavova suda zaključujemo da:

• Sva ključna pitanja jednog slučaja moraju biti razmotrena, i to mora biti jasno iz same odluke[83].

Član 6 stav 1 konvencije propisuje obavezu suda da "sprovede odgovarajuće ispitivanje podnesaka, argumenata i dokaznog materijala koje su stranke podnijele, bez predrasuda u pogledu toga da li su relevantni za odluku."[84]

80) Jovanović v. Serbia, 32299/08, § 50; Nejdet Şahin and Perihan Şahin v. Turkey, 13279/05, § 49-50.

81) Kuchoglu v. Bulgaria, 48191/99, § 50.

82) Boldea v. Romania, 19997/02, § 32; Taxquet v. Belgium, § 91.

83) Izdvojena mišljenja u odluci Tautkus v. Lithuania (podudarno mišljenje sudija Danutė Jočienė i Isabelle Berro-Lefèvre naglašava da se presuđivanje Suda u Strazburu ne može zasnivati na argumentima koji nikada nisu iznijeti pred nacionalnim sudovima) ukazuju na podijeljena mišljenja u pogledu pitanja o tome da li razmatranja argumenata koje podnosilac tužbe nije istakao pred nacionalnim sudovima predstavljaju odstupanje od doktrine četvrtog stepena. Doktrina četvrtog stepena jeste uvijek bitno pitanje pred Sudom u Stazburu, pa zaključci koji se tiču dozvoljene argumentacije moraju biti ograničenog dometa.

84) Van de Hurk, 16034/90, § 59, Perez v. France, 47287/99, § 81, Wagner and J.M.W.L. v. Luxembourg, 76240/01, § 89; Kraska v. Switzerland 13942/88, § 30; Barberà, Messegué and Jabardo v. Spain, 10588/83, 10589/83, 10590/83, § 68.

U presudi Kraska v. Switzerland (13942/88) jedan od osnovnih argumenata podnosioca predstavke bio je taj je da sudija švajcarskog Federalnog suda, koji je sudio u slučaju na nacionalnom nivou, javno naglasio da nije bio u prilici da pregleda priložene materijale, jer su mu kasno dostavljeni. U demokratskom društvu sudovi su, na osnovu prakse Suda u Strazburu obavezni da nastoje da ulivaju povjerenje u javnosti i kod stranaka u postupku. Pritom su utisci stranaka značajni, ali nisu i odlučujući, ali se objektivnost sumnji u to da se jedan od sudija nije dovoljno upoznao sa materijalima u ovom slučaju ne mora provjeravati, jer ih je potvrdio sam sudija. U svakom slučaju, podnosilac predstavke pred Sudom ipak mora da dokaže da je osnovana njegova sumnja u to da se tribunal nije na odgovarajući način upoznao sa slučajem prije donošenja odluke.

• Tribunal je obavezan da ispita materijale, argumente i dokaze koje su stranke podnijele, bez obzira na utiske o tome da li su svi materijali, argumenti i dokazi relevantni za donošenje odluke.

Ta obaveza je od posebnog značaja u onim slučajevima u kojima su sudovi zanemarili argumente, materijale i dokaze koji su od odlučujućeg značaja za ishod postupka pred sudom. U slučaju *Ruiz Toria v. Spain* (18390/91) podnosilac predstavke je tvrdio da je neobaziranje drugostepenog suda na prigovor da je tužba pred prvostepenim sudom protiv njega neblagovremena predstavlja kršenje člana 6. stava 1. Konvencije. Prigovor o neblagovremenosti podnosilac predstavke je podnio u pisanoj formi, formulisao ga jasno i precizno i naveo relevantne dokaze. Drugostepeni sud pred kojim je suđenje ponovljeno nije uopšte odlučio po prigovoru o neblagovremenosti (§ 11). Sud je presudio da postoji povreda člana 6. stava 1, navodeći da je na osnovu same odluke apelacionog suda nemoguće zaključiti da li je sud ćutanjem odbio prigovor, ili je pak prigovor o blagovremenosti naprosto zanemario. Obrazložena odluka o prigovoru, tj. izričiti navedena odluka po prigovoru je morala, dakle, biti sastavni dio presude, da bi se presuda smatrala obrazloženom. U *Hiro Balani v. Spain* (18064/91) podnosilac predstavke je pred nacionalnim sudom priložila podnesak o prvenstvu žiga, takođe u pisanoj formi, jasno i precizno, navodeći relevantne dokaze, ali se revizioni sud u ovom slučaju takođe nije izjasnio o podnesku, pa je Sud presudio da je prekršen član 6. stav 1. U oba slučaja su okolnosti zahtijevale da se revizioni sud izričito izjasni o navodima stranke; u suprotnom se prema stavu Suda ne može zaključiti da li je revizioni sud prosto zanemario navode koji su od značaja za ishod spora, ili je pak namjeravao da zahtjeve odbije.

• Ako su podnesci stranaka odlučujući za ishod spora, odgovor tribunala na nacionalnom mora biti izričito naveden u presudi.

Po praksi Suda u Strazburu nacionalni sud je obavezan da se izjasni o glavnim argumentima strana koje se tiče rasuđivanja u slučajevima u kojima je ljudsko pravo potencijalno ugroženo, a to je istaknuto od strane lica kojem je pravo ugroženo u postupku pred nacionalnim sudovima. Presuda *Wagner and J.M.W.L. v. Luxembourg* (76240/01) pokazuje da se pojedini propusti nacionalnih sudova u pogledu razmatranja navoda stranke koji su se ticali člana 8. Konvencije, shvataju kao kršenje prava na obrazloženu presudu (§ 96). Podnosilac predstavke je u ovom slučaju pred nacionalnim sudovima uporno tvrdio da sud bio u obavezi da njegove tvrdnje podrobno razmotri. Sud je odlučio da povreda člana 6 postoji upravo na osnovu toga što nacionalni sudovi, a naročito sudovi druge i treće instance, nisu razmotrili navode o kršenju prava iz Konvencije, koje se, u ovom slučaju, odnosi na poštovanje privatnog i porodičnog života.

• Kada postoji zahtjev stranke koji se tiče prava i sloboda garantovanih Konvencijom, nacionalni sudovi su obavezni da zahtjev razmotre podrobno i s pažnjom.

U slučaju *Brežec v. Croatia* (7177/10) Sud je utvrdio da odluke nacionalnih sudova kojima se nalaže iseljenje iz stana u kojem je podnosilac predstavke živio preko 35 godina nisu u skladu s članom 8. Konvencije kojim je propisano pravo na poštovanje privatnog i porodičnog života. Član 8. taksativno nabraja situacije u kojima je upliv javnih vlasti u privatni i porodični život dozvoljen, ali samo u onoj mjeri u kojoj je taj upliv nužno u demokratskom društvu. Predstavka podnosioca je proglašena dopuštenom upravo u vezi s centralnim pitanjem da li su domaći sudovi cijenili da li je iseljenje mjera koja je proporcionalna u odnosu na cilj koji se namjerava postići mjerom iseljenja - cilj se dakako sastoji u zaštiti prava zakonitog vlasnika. Upravo je u tom smislu, uprkos tome što u pomenutom slučaju nije utvrdio povredu člana 6. Konvencije, Sud stao na stanovište da se analiza proporcionalnosti mora primijeniti u svakom onom slučaju kada je nekom državnom mjerom povrijeđeno određeno ljudsko pravo, tj. kada postoji rizik od povrede ljudskog prava.

• Obrazloženje presude mora sadržati analizu proporcionalnosti uvijek kada je predmet presude slučaj u kojem je nekom državnom mjerom ugroženo ljudsko pravo ili postoji bojazan da će ljudsko pravo biti ugroženo. [85]

Nacionalni sudovi u Hrvatskoj jesu, dakle, postupili u skladu s propisima na nacionalnom nivou, ali su u potpunosti zanemarili navode podnosioca predstavke koji se tiču proporcionalnosti mjere iseljenja s obzirom na specifične okolnosti slučaja. Odsustvo analize proporcionalnosti sprovedene od strane sudova na nacionalnom nivou navelo je Sud u Strazburu na zaklju-

85) Sa stanovišta zakonodavne politike, koja neposredno nije predmet ovog rada Sud zauzima stanovište da lice kojem je potencijalno ugroženo ljudsko pravo mora u okviru nacionalnog pravnog sistema imati nezavisan sud koji će ocijeniti proporcionalnost i razumnost mjere koja potencijalno ugrožava ljudsko pravo. U konkretnom slučaju to znači da je analiza proporcionalnosti u vezi s članom 8. neophodna bez obzira na to da li u okvirima nacionalnog pravnog sistema podnosilac predstavke ima pravo da živi u stanu.

čak da sudovi nisu na odgovarajući način uvažili pravo iz člana 8. Konvencije. U prethodnom dijelu teksta smo podrobnije izložili šta predstavlja analiza proporcionalnosti iz perspektive prakse Suda u Strazburu. Upravo je u tom smislu, u slučaju *Brežec v. Croatia* nedvosmisleno utvrđena obaveza da se obim ugrožavanja određenog prava izričito samjeri s drugim pravom koje se štiti, tj. s javnim interesom koji se štiti umanjenjem prava u pitanju.

U slučaju *Lakićević et al. v. Serbia and Montenegro* (27458/06, 37205/06, 37207/06, 33604/07) takođe se, uz određena ograničenja, naglašava obaveza suda da sprovede analizu proporcionalnosti između sredstava koja su upotrijebili državni organi i cilja koji se namjeravao postići. U tom slučaju je sud u vezi s članom 1. Protokola 1 uz Konvenciju odlučio da su podnosioci predstavke, koji su od strane upravnih organa na osnovu važećeg zakona obavezani da vrate iznos penzija koje su primili nakon stupanja na snagu odredaba kojima je njihova pravo na penziju prestalo, ukidanjem penzija prisiljeni da podnesu pretjerano veliki i nesrazmjeran teret (§ 72). Svaka mjera kojom se umanjuje neko pravo mora biti proporcionalna cilju koji se njome namjerava postići (§ 61), te je i prekršaj odredaba Konvencije u ovom slučaju mogao biti izbjegnut razumnim i srazmjernim smanjenjem ili omogućavanjem prelaznog perioda u kojem bi se podnosioci predstavke prilagodili okolnostima koje su nastale stupanjem na snagu novog zakona (§ 72).

4. Sudska praksa

Sud je u toku cjelokupnog svog postojanja pripisivao značaj sudskoj praksi na nacionalnom nivou u kontekstu člana 6, stava 1 Konvencije. O tome svjedoče brojne presude kakve su: *Reinhardt and Slimane-Kaïd v. France* (23043/93, 22921/93), *Meftah et al. v. France* (32911/96, 35237/97, 34595/97), *Voisine v. France* (27362/95), *Wynen v. Belgium* (32576/96) i druge. Presude o kojima je riječ odnose se na praksu svih državnih organa, bez obzira na to da li ti organi imaju status tribunala ili ne. U slučaju Gorou v. Greece sud je praksu javnog tužioca iskoristio da bi ocijenio da li je podnosilac predstavke u postupku pred nacionalnim sudovima zaista iskoristio pravni lijek (§ 32-34). Iz značaja prakse na nacionalnom nivou proizlaze i određene obaveze svih državnih organa što je posebno istaknuto u presudama *Jovanović v. Serbia* (32299/08, § 50) i *Nejdet Şahin and Perihan Şahin v. Turkey* (13279/05, § 56-57).

U tim presudama sud zauzima sljedeći stav:

• Državne vlasti, uključujući tu i tribunale, moraju primjenjivati domaće zakonodavstvo na predvidljiv i ustaljen način.

U skladu s doktrinom četvrte instance, Sud u principu ne postavlja sebi za zadatak upoređivanje različitih sudskih presuda na nacionalnom nivou, smatrajući da u svim pravnim sistemima postoji mogućnost razlika u presudama povodom sličnih ili istih slučajeva, čak i pred istim sudovima. Postoje ipak praktični standardi koje je Sud formulisao kako bi u svakom pojedinačnom slučaju cijenio da li je neujednačena sudska praksa takva da dovodi do kršenja člana 6, stava 1.

Presuda Iordan *Iordanov et al. v. Bulgaria* (23530/02) ustanovljava važan kriterijum koji se upravo tiče ujednačenosti sudske prakse na nacionalnom nivou, a u neposrednoj je vezi s pravom na obrazloženu presudu. Taj kriterijum je podrobnije razmotren i izložen u kompleksnijem slučaju *Nejdet Șahin* i *Perihan Șahin v. Turkey* (13279/05). Stanovište koje je sud zauzeo u tim presudama bilo je od presudnog značaja i prilikom presuđivanja u slučaju *Tomić et al. v. Montenegro* (18650/09, 18676/09, 18679/09, 38855/09, 38859/09, 38883/09, 39589/09, 39592/09, 65365/09, 7316/10). Podnosioci predstavke su u slučaju *Nejdet Șahin i Perihan Șahin v. Turkey* kao povredu člana 6. stava 1. Konvencije istakli da je rodbina stradalih u avionskoj nesreći u kojoj je stradao i njihov sin uspijevala da dobije sporove pred nacionalnim sudovima u Turskoj ističući tužbene zahtjeve koji su ili identični ili slični onom koji je podnosiocima predstavke Vrhovni vojni administrativni sud Turske odbio. S obzirom na specifičnosti turskog pravosudnog sistema, u kojem postoji nekoliko vrhovnih sudova koji paralelno interpretiraju pravo, Sud je zauzeo stanovište da periodi suprotstavljene sudske prakse mogu biti tolerisani bez ugrožavanja pravne sigurnosti. Upravo zbog toga sud u ovom slučaju nije ni primijenio uobičajeni kriterijum za ocjenu da li neujednačenosti u sudskoj praksi proizvode pravnu nesigurnost koji je ustanovljen u presudi Iordan *Iordanov et al. v. Bulgaria* (§ 48-49). Kriterijum jeste "duboke i dugotrajne razlike u sudskoj praksi."[86]

86) Nejdet Șahin i Perihan Șahin v. Turkey, § 53.

• U sudskoj praksi na nacionalnom nivou ne smiju da postoje duboke i dugotrajne razlike u presuđivanju povodom istih ili sličnih slučajeva.

Slučaj *Ștefănică et al. v. Romania* (38155/02) pokazao je da se pravna sigurnost ne odnosi isključivo na ujednačenu praksu sudova, već da je treba posmatrati kao mogućnost pouzdanja u dosljednost u sprovođenju jedinstvenog pristupa od strane svih državnih organa koji su uključeni u rješavanje jednog pravnog pitanja. Sud jasno ističe kriterijum da mjera koja je normativno ustanovljena na državnom nivou (u ovom slučaju se ona odnosila na kolektivno otpuštanje radnika iz kompanija u državnom vlasništvu) mora biti sprovođena razumno, jasno i koherentno, pa se i ponašanje države mora cijeniti s obzirom na rad zakonodavnih, upravnih i

sudskih organa (§ 32). U Rumuniji su okružni sudovi u sporovima te vrste bili sudovi posljednje instance, pa nije postojao odgovarajući mehanizam za ujednačavanje njihove prakse (§ 36). Uobičajeno je da je ujednačavanje sudske prakse u nadležnosti Vrhovnog suda, što nije bio slučaj. Podrazumijeva se da ocjena činjenica i tumačenje prava od strane osnovnih sudova može dovesti do različitih ishoda sporova (§ 37). Ipak, kao što je više puta prethodno istaknuto, nausaglašena sudska praksa može dovesti do smanjenja pouzdanja javnosti u sudstvo, čime se podriva pravna sigurnost, te i temelji vladavine prava (§ 38). Upravo u tom smislu od posebnog značaja za ujednačenu sudsku praksu sa stanovišta nacionalnog pravnog sistema jeste postojanje funkcionalnog mehanizma koji bi mogao obezbjediti uniformnu primjenu prava.

• Primjena supstantivno sličnih pravnih normi na lica koje pripadaju skoro pa identičnim grupama mora biti ujednačena, kao što mora postojati mehanizam za rješavanje eventualnih neujednačenosti.

Sud je i u presudama po tužbama protiv Crne Gore potvrdio da njegova uloga nije da ispituje kako nacionalni sudovi tumače domaće pravo, niti da upoređuje odluke tih sudova.[87] Duboke i dugotrajne razlike u praksi najvišeg domaćeg suda mogu kršiti princip pravne sigurnosti, koji je implicitno sadržan u Konvenciji, pa je i jedan od osnovnih elemenata vladavine prave.[88] U tom smislu Sud u Strazburu utvrđuje da li u praksi Vrhovnog suda postoje duboke i dugotrajne razlike, da li domaće pravo predviđa mehanizam za prevazilaženje nedosljednosti; da li je u konkretnom slučaju taj mehanizam upotrijebljen i sa kakvim posljedicama. To nas dovodi i do posljednje maksime obrazloženog presuđivanja koja se može izvesti iz prakse Suda:

• Praksa najviših sudova u državi mora biti konzistentna u najvećoj mogućoj mjeri. Konzistentnost znači poštovanje principa pravne sigurnosti, što podrazumijeva pretežno presuđivanje u skladu s prethodnim odlukama najviših sudova u slučajevima koji su isti ili bitno slični.

5. Pravo na pravni lijek i izvršenje presuda u slučajevima protiv Crne Gore

U osnovnom tekstu poglavlja su uz presude koje su ključne za pravo na obrazloženu presudu, obrađene i pojedine presude Suda u Strazuburu koje se odnose na Crnu Goru. Posebno su obrađene presude *Tomić et al. v. Montenegro* i *Barać et al v. Montenegro* koje se tiču ujednačene sudske prakse i obrazloženja presude, kao i presuda koja se jednim dijelom tiče analize proporcionalnosti – *Lakićević et al. v. Serbia and Montenegro*.

87) Tomić et al. v. Montenegro, 18650/09, 18676/09, 18679/09, 38855/09, 38859/09, 38883/09, 39589/09, 39592/09, 65365/09, 7316/10.

88) Nejdet Şahin and Perihan Şahin v. Turkey, 13279/05; Beian v. Romania, 30658/05.

Presude u slučajevima protiv Crne Gore se najčešće ne odnose neposredno na pravo na obrazloženu presudu već na druga prava iz člana 6. Konvencije. Najveći broj tih presuda odnosi se, očekivano, na povredu prava na suđenje u razumnom roku. Po broju ne zaostaju ni presude koje se tiču prava na pravni lijek koje podrazumijeva da pravni lijekovi koji podnosiocima predstavke stoje na raspolaganju prije podnošenja predstavke ispunjavaju sljedeće uslove: 1) djelotvornost (ne samo normativna i teorijska već i praktična); 2) dostupnost; 3) moraju da pruže pravno zadovoljenje u odnosu na relevantne pritužbe; i 4) pružaju razumne izglede za uspjeh.[89] Efikasnim se smatra onaj pravni lijek koji se može iskoristiti radi ubrzanja postupka pred sudom koji o slučaju odlučuje, ili ako može da ispravi zastoje koji su se već ranije desili što je ustanovljeno i u slučaju *Sürmeli v. Germany* (75529/01, § 99). Svi zahtjevi moraju dakako biti ispunjeni u skladu s okolnostima konkretnog slučaja. Valja pritom imati na umu da se ustavna žalba ne može smatrati djelotvornim pravnim lijekom na nacionalnom nivou u pogledu prava na suđenje u razumnom roku.[90]

Posebno interesantna grupa presuda protiv Crne Gore sa stanovišta prava na obrazloženu presudu tiče se jedne od tema kojih smo se u prethodnom tekstu dotakli, ali je nismo obrazložili. Riječ je o stavu Suda u Strazburu da je primjena presude sastavni dio suđenja. U slučaju *Velimirović v. Montenegro* (20979/07) Sud je presudio da je povrijeđen član 6. stav 1. Konvencije zastupajući upravo stav da bi pravo na sud bilo iluzorno kada bi države ugovornice dopuštale da pravnosnažne, izvršne sudske odluke ostanu neoperativne na štetu jedne od strana (§40). Sud je taj svoj stav potvrdio i u presudama *Mijanović v. Montenegro* (19580/06) i *Milić v. Serbia and Montenegro* (28359/05). Uprkos tome što se pomenute presude tiču u prvom redu pravosudne politike, ustrojstva i odnosa državnih organa, iz prethodnog kao standard presuđivanja proizlazi sljedeće:

• Izvršenje presude jeste sastavni dio suđenja, a pravosnažne i izvršne presude moraju biti sprovedene u praksi.

89) A. and B. v. Montenegro, 37571/05, § 56; Novović v. Montenegro, 13210/05, § 34; Stakić v. Montenegro, 49320/07, § 58; Boucke v. Montenegro, 26945/06, § 68.

90) Boucke v. Montenegro, 26945/06, §§ 75-79; Stakić v. Montenegro, 49320/07, §41.

STANDARDI OBRAZLOŽENOG PRESUĐIVANJA

U prethodnom izlaganju smo detaljno razmotrili doktrinu obrazloženog presuđivanja Suda u Strazburu, presude povodom tužbi protiv Crne Gore koje se tiču člana 6, kao i osnovne postavke odlučivanja sâmog Suda. Na osnovu tih razmatranja došli smo i do nekih osnovnih pravila, maksima, sentencija koje se tiču obrazloženog presuđivanja, a koja ćemo u ovom preglednom dijelu sumarno izložiti.

1. Tribunali su obavezni da navedu odgovarajuće i dovoljne razloge za odluke, tj. dužni su da opravdaju svoje radnje obrazlažući svoje odluke.

2. Razlozi na kojima je presuda zasnovana jesu odgovarajući ako a) omogućavaju strankama da efektivno iskoriste pravo na pravni lijek i b) ako su zasnovani na važećem nacionalnom pravu.

3. Revizioni tribunali su obavezni da isprave manjkavosti u argumentaciji nižih sudova ako je jedan od osnovnih navoda stranke u revizionom postupku taj da je argumentacija prvostepenog tribunala neodgovarajuća, nekoherentna ili protivrječna.

4. Revizioni sudovi se po pravilu moraju izjasniti o ključnim podnescima stranaka ukoliko su oni bili predmet rasprave u prvom stepenu, bez obzira na to da li su izričito navedeni prilikom ulaganja pravnog lijeka, a ćutanje revizionog suda se ne može tumačiti kao prećutno odbijanje prigovora.

5. Presuda mora biti formulisana dovoljno jasno da javnost može da je razumije u mjeri koja je neophodna radi održavanja povjerenja javnosti u pravosuđe.

6. Neodređeni pravni pojmovi (pravni standardi) koji nisu na odgovarajući način razrađeni u odluci, normativnim dokumentima ili u sudskoj praksi, pa se ne može sa sigurnošću utvrditi njihova sadržina, imaju ograničeno dejstvo u postupku u tom smislu da se odluka ne može u potpunosti zasnovati na njima.

7. Sva ključna pitanja jednog slučaja moraju biti razmotrena, i to mora biti jasno iz same odluke.

8. Tribunal je obavezan da ispita materijale, argumente i dokaze koje su stranke podnijele, bez obzira na utiske o tome da li su svi materijali, argumenti i dokazi relevantni za donošenje odluke.

9. Ako su podnesci stranaka odlučujući za ishod spora, odgovor tribunala na nacionalnom mora biti izričito naveden u presudi.

10. Kada postoji zahtjev stranke koji se tiče prava i sloboda garantovanih Konvencijom, nacionalni sudovi su obavezni da zahtjev razmotre podrobno i s pažnjom.

11. Obrazloženje presude mora sadržati analizu proporcionalnosti uvijek kada je predmet presude slučaj u kojem je nekom državnom mjerom ugroženo ljudsko pravo ili postoji bojazan da će ljudsko pravo biti ugroženo.

12. Državne vlasti, uključujući tu i tribunale, moraju primjenjivati domaće zakonodavstvo na predvidljiv i ustaljen način.

13. U sudskoj praksi na nacionalnom nivou ne smiju da postoje duboke i dugotrajne razlike u presuđivanju povodom istih ili sličnih slučajeva.

14. Primjena supstantivno sličnih pravnih normi na lica koje pripadaju skoro pa identičnim grupama mora biti ujednačena, kao što mora postojati mehanizam za rješavanje eventualnih neujednačenosti.

15. Praksa najviših sudova u državi mora biti konzistentna u najvećoj mogućoj mjeri. Konzistentnost podrazumijeva poštovanje principa pravne sigurnosti, što podrazumijeva pretežno presuđivanje u skladu s prethodnim odlukama najviših sudova u slučajevima koji su isti ili bitno slični.

16. Izvršenje presude jeste sastavni dio suđenja, a pravosnažne i izvršne presude moraju biti sprovedene u praksi.

INDEKS ANALIZIRANIH PRESUDA

INDEKS ANALIZIRANIH PRESUDA

Indeks sadrži presude Suda u Strazburu koje su analizirane za potrebe izrade publikacije. Iz razloga preglednosti indeks je podijeljen tematski, a presude su poređane hronološki po broju predstavke.

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Bojan Spaić
Goran Dajović

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PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS

CENTER FOR DEMOCRATIC TRANSITION

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RIGHT TO A REASONED JUDGMENT
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AUTHORS

Bojan Spaić
Assistant Professor at the University of Belgrade Faculty of Law

Goran Dajović
Associate Professor at the University of Belgrade Faculty of Law

RESEARCH

Miloš Marković
Slobodan Radovanović

EDITOR

Miodrag Jovanović
Professor at the University of Belgrade Faculty of Law

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Vukašina Markovića bb
81 000 Podgorica, Montenegro
tel: +382 20 234 522
email: cdtmn@t-com.me
www.en.cdtmn.org

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EDITOR'S PREFACE

Although this publication was produced as a part of the project 'Initiative for Open Judiciary', what initially triggered the reflection on the right to a reasoned court ruling was an interview with a high judicial official from one of the countries in the region. When asked by the journalist whether part of the evaluation process of judges may be the quality control of the reasoning of court decisions, as there are many complaints of this kind coming from the European Court of Human Rights, the response of the interviewed official was decidedly negative. According to him, those who would evaluate the reasoning behind judgments would necessarily "scrutinize the court ruling," which is the job of the immediately higher court. The study that we are presenting to the public is a confirmation of what we intuitively believed from the beginning – that the quality of the reasoning of a court judgment can be evaluated based on a series of "external", formal-logical, argumentative and procedural features, without questioning the merits of the decision itself. In other words, this study shows that the quality of judicial work can be evaluated according to a number of standards which every judge must take into account when deciding and formulating any judgment in order to make it adequately substantiated by the standards of the European Court of Human Rights.

For quite some time in our public, the right to a fair trial, envisaged by the Article 6 of the European Convention on Human Rights, is being viewed primarily from the perspective of the right to trial within a reasonable time. The focus of the general public on this particular segment of Article 6 is fully understandable, given the (in)efficiency of the domestic judiciary. The public pressure and demands for more effective operation of the judiciary, after all, led to the adoption of specific legislation dealing with the protection of the right to trial within a reasonable time. The downside of this focus on the aforementioned aspect of Article 6 is reflected in the neglect of other important segments of the right to a fair trial. Namely, as the majority of other rights in the Convention, the one in question is "complex" in its nature (cluster right), which means it consists of a number of interconnected powers. One of them is the right to a reasoned judgment that the law of the European Court of Human Rights has developed in close connection with the right to a remedy and the right of access to court. The importance of properly substantiated court judgment can be viewed from two perspectives. Firstly, it can be viewed from the perspective of the party whose rights and obligations are decided in court proceedings. The right of a party who is not satisfied to directly address a higher court would be a mere dead letter if the judgment had not been adequately reasoned. This

perspective is particularly taken when considering the right to a reasoned court judgment. There is, however, another perspective that is very seldom discussed in our context, even when it comes to the professional literature. It is the perspective of the broadest public opinion. The ability of the judiciary to present itself to the public as an independent branch of government (appearance of independence), will largely depend on whether the court decisions are duly substantiated and whether they are sufficiently clear to the general public, on whose confidence, in the end, rests the authority of the judiciary. Formal irreversibility of final court decisions, which represents a pillar of the rule of law, should not, in this sense, be confused with the legitimate right of the public to critically engage with the arguments on which those decisions are based.

Both of these perspectives are built into the practice of the European Court of Human Rights and, hence, in this study, they are being translated into the appropriate standards that judges should follow so that their judgments could meet the reasoning criteria. The catalog of formulated standards, which can be found at the end of this study, should not, however, be treated as a mere "user guide", because the process of judging is deprived of any automatism, especially in the highest judicial instances. Therefore, full implementation of these standards, demands observation in the context of previous theoretical and doctrinal considerations. Only in the light of these findings one can fully understand the nature and scope of the right to a reasoned judgment as it was developed in the practice of the European Court of Human Rights.

Miodrag Jovanović
Professor at the University
of Belgrade Faculty of Law

INTRODUCTORY REMARKS

The European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention), adopted by the Council of Europe in 1950, only two years after the adoption of the Universal Declaration of Human Rights, is a unique European Charter on Human Rights, through which the signatory states agreed to give to rights from the Declaration their binding force, to protect them and improve them. However, the importance of the Convention does not stem not only from its progressive content or the fact that it was the first pan-European document on the protection of human rights. It is indeed reflected in the fact that the Convention established the most effective institutional mechanism of control of its application in the states that have signed it, and in their acceptance to submit to compulsory execution of liabilities that have been adopted after ratifying the Convention. When it comes to its effectiveness and the institutional mechanism of control of its application, it is of special importance to bear in mind the Protocol No. 11, which is an integral part of the Convention, establishing a judicial authority, in its full capacity - the European Court of Human Rights in Strasbourg (hereinafter referred to as: the Court or the Court in Strasbourg) - responsible for the interpretation of the Convention and for passing judgments against contracting states in the event that they violate the rights and freedoms guaranteed by the Convention. According to this Protocol, the role of the Court is reinforced by the fact that it guarantees the right to any individual to submit to the Court an individual petition against the contracting state if they feel violation of any right or freedom which the Convention guarantees, thus taking the Court action against this country, regardless of its willingness to be a party in the proceedings: "Thus, individuals now enjoy at the international level a real right of action to assert the rights and freedoms to which they are directly entitled under the Convention."[1]

1) Mamatkulov and Askarov v. Turkey, 46827/99, 46951/99, § 122.

During its decades-long practice, the Court in Strasbourg has managed to establish itself as the referential pan-European judicial institution in the field of human rights and freedoms, which means that this Court, in the case of application of the provisions of the Convention, today represents the highest interpretative authority for forty-seven states, members of the Council of Europe, and over 850 million inhabitants of these countries. On the one hand, evolutionist, extensive and teleological interpretative approaches to the text of the Convention, have led the Court to develop and sometimes even expand the body of human rights that the Convention protects and guarantees in its original form. On the other hand, by insisting on the principle of efficiency and effectiveness of the provisions of the

Convention, the Court was able to cause real changes in the legislative and judicial practices of the contracting states when it comes to the protection of human rights and freedoms, and not only to provide individuals with an individual justice, that is to provide protection and fair compensation to those whose human rights guaranteed by the Convention were violated. From all that has been said so far, it is clear how important the system of protection of human rights established by the Convention is for each member. In this regard, it is of particular importance for national legal systems of the contracting states and their judicial institutions to be aligned with the practices and authoritative interpretations of judgments of the Court in Strasbourg, in the domain of human rights.

With this in mind, the publication that is before the reader shall explain in detail the content of one right - the right to a reasoned judgment - that is not expressly stated in the text of the Convention, but which was established through the practice of the Court and its interpretation of Article 6 of the Convention. Below, we will present the practice, and explain how the Court itself argues and reasons its judgments, but first and above all, we will determine which standards of good judgment, argumentation and reasoning are used by the Court in Strasbourg when deciding on decisions of national courts of the contracting states in cases which may involve violation of the rights and freedoms guaranteed by the Convention. The main intention of the author is reflected in the contents of the publication.

The key chapter provides a detailed analysis of the judgments of the Court in Strasbourg when dealing with the potential violation of the right to a reasoned (court) judgment, with the aim to draw appropriate conclusions about the standards of good argumentation and reasoning gradually instituted by the Court. The central and most important chapter is preceded by three short introductory and preparatory chapters aimed at putting the central one into a broader theoretical, institutional and interpretative framework and thus contributing to a better understanding of the critical analysis of the Court in Strasbourg in connection with the right to a reasoned judgment:

The first of the three mentioned chapters, briefly sets out the widest theoretical framework for any discussion on forms of legal reasoning, the valid and invalid arguments, and explains how a law (legal) community produces conventions that establish the principles of acceptable legal argumentation and reasoning of decisions in the application of law and how these conventions differ depending on what kind of legal community is concerned.

The second chapter is particularly focused on the analysis of the general position of the Court in Strasbourg in the framework of the system of protection of human rights and freedoms guaranteed by the Convention, especially in terms of its powers and mode of operation. The same chapter discusses several most important interpretative principles or arguments which the Court most frequently resorts to, in the application of the Convention, and which are consistently used in the reasons for its judgments.
Finally, the third chapter that precedes the central section on the reasoned judgment, specifically addresses Article 6 of the Convention, which, in general, guarantees the right to a fair trial. This section brings a more detailed analysis of that article, that is, the right which the Court "derived" or based on that article of the Convention during its practice, including the right to a reasoned judgment which is discussed more towards the end of the third chapter.

CHAPTER I

General framework of acceptable legal argumentation and reasoning

1. Introduction

One of the greatest contributions of the Roman legal civilization to the modern law is that there some principles of acceptable legal reasoning and argumentation were formulated already in the age of Roman casuistry.[2] That was, first of all, witnessed in the inclination of Roman lawyers to use a set of arguments and principles of reasoning, characteristic only for legal discourse, instead of using only logical or rhetorical means in legal disputes. To a somewhat lesser extent, this contribution, lies in the fact that Roman lawyers supplied us with specific list of principles and arguments of acceptable reasoning (although their contribution is very significant in this regard as well), and more in the fact they showed that such a list of arguments (whatever its content could be) still exists in their ranks and, more importantly, that it is being used in legal practice, particularly in the judicial one.

2) Antony Morice Honore, "Legal reasoning in Rome and Today", South African Law Journal, Vol. 91/1974, p. 92.

Therefore, one of the criteria to assess whether an argument used to solve a controversial legal case (for example, in court) is good or not, depends on its quality of being "acceptable" as such in the current legal "traffic", whether it is conventionally practiced among the judges in a system of justice, when they perform legal reasoning. This "acceptability" is, therefore, palpable and in a way imposed on the lawyers as a framework, in which they must move, so that reasons, arguments and justifications for the decisions they make could be considered as a legal (juristic) reasons, arguments and justifications.

The outcome of the process of legal reasoning is usually a decision, but the purpose of reasoning is not only to reach a decision, but also to justify and explain it. Since the decision is justified primarily to the legal "audience", it is clear that the quality and value of such a justification crucially depend on the judgment of that particular audience. The decision, above all, refers to the parties in the process, but the potential audience addressed by judges in their explanations of decision is significantly broader – apart from the parties to the dispute, their representatives and members of the legal profession, the explanation is intended for the scientific, political and lay public, and, in some way, all state authorities. However, the reasoning of the decision is made up of legal arguments – and that means of arguments that

lawyers refer to lawyers who are best suited to assess their (lack of) logic, (and) rationality, formal (un)acceptability and so on. Therefore, it is the legal audience who determines the terminology, canons of argumentation and finally gives its verdict about the validity of the aforementioned explanations. Without mediation by the legal audience, it is far more difficult for other interested public to judge if and to what extent the legal arguments in a case are valid or not. Higher instance courts are particularly important in this regard[3] since their duty is to examine the validity of the decisions of the lower courts. In this context, one should understand and analyze the position and practice of the Court in Strasbourg, which ensues, and which in its central part addresses the very standards of good argumentation and reasoning of court decisions that this Court has established.

However, before all, it should be noted that in this context the term "acceptable" (argument) does not mean the same as "correct" (argument). Specifically, the latter implies that, for example, a judge, using "correct" reasoning argument always and inevitably reaches "correct" or the right answer to a specific legal (or factual) question, but in fact it does not happen. The term "acceptable" is more appropriate because it sets limits to the judges (and lawyers in general) in legal reasoning only, determining which arguments and techniques are acceptable to the appropriate legal audience, in the process of legal reasoning and explaining decisions reached in applying the law, without suggesting that their application will make all the lawyers to come to the same and the only correct conclusion about the issue.[4] Despite the fact that the use of acceptable arguments in the legal reasoning and decision-making does not necessarily lead to a single right answer to the issue (or issues), a long tradition of legal reasoning clearly crystallized the idea that using other (unacceptable) arguments certainly indicates that a specific response to the disputed legal question is wrong. Therefore, although systematizing and listing acceptable arguments used by a group of lawyers within a particular legal system in judging and reasoning of their decision does not constitute a ready-made recipe for providing a single right answer to any question of law, it nevertheless sets out a framework outside of which all the answers to the legal questions within that the system are undoubtedly wrong.[5]

3) Beside courts, particularly important in assessing certain form of legal reasoning, is doctrine, that is the analyses and reviews written by lawyers-scientists, and this text is an example of such an analysis of a specific practice of a specific court regarding the issue of well reasoned judicial decisions.

4) Since mere compliance with the rules of grammar is necessary but not sufficient condition of good writing style, the same goes for sticking to acceptable legal arguments and principles – it is a necessary, but not sufficient condition for justification, grounds and accuracy of a legal decision.

5) John. Bell, "The Acceptability of Legal Argument", in Neil MacCormick, Peter Birks (eds.), The Legal Mind, Essays for Tony Honore, Oxford: Clarendon Press, 1986, pp. 45-66;

2. Theoretical frameworks of acceptable legal argumentation

What is this framework like, or to speak in the most general terms, what makes up such a framework of "acceptable" argumentation and reasoning of decisions?

The first boundary of this framework of legal argumentation can certainly be seen in the rules of formal logic, because it is the first boundary of the rational argumentation. Irrational arguments are usually unacceptable within a certain circle of legal institutions (for example, personal prejudices of decision-makers, irrational forms of proving and concluding such as throwing dice or asking the "oracle"), and it is assumed that the whole argumentation and reasoning of decisions must not be logically contradictory, that is that they must be coherent. This particular "logical" aspect of legal reasoning is often discussed by the Court in Strasbourg in its decisions concerning the right to a reasoned judgment, which will be further discussed in the chapter four.

Another boundary of any legal argumentation and reasoning, however, is inherent in the tradition of legal profession and is the result of inventions of generations of lawyers-professionals and practice of legal institutions. Every single educated lawyer is familiar with most of the arguments from that "list" which is passed from generation to generation and which allows lawyers to rely on accepted and undisputed arguments that are conventionally established among the legal audience. Having in mind that the list of such arguments can never be exhaustive, and that specific legal audience or national legal order, or one influential and important legal institution (since the subject of this publication is a supranational judicial institution) may cherish specific canons of argumentation and reasoning,[6] we will contend that they are formal and procedural[7] (e.g. systematic, semantic, linguistic arguments), and substantive (e.g. teleological or evolutionary arguments). In a certain way, they can be mixed, as is the argument of balance (that is, the test of proportionality). Some of these arguments especially used by the Court in Strasbourg will be discussed at length in the next section.

Finally, from what has been said so far it clearly follows that the legal reasoning (and argumentation) is in fact juristic reasoning. The so-called "educated" mind of the particular lawyer is only a reflection, a reflection of the collective of legal reason (which is sometimes referred to as legal logic) that represents the heritage of knowledge, skills and experience of generations of people who have practiced law. When put in terms of the contemporary social theory, it is, therefore, clear that lawyers belong to

6) These particularities, when it comes to the Court in Strasbourg, will be discussed in detail in the next section.

7) In the sense that they do not reflect some moral or legal principles.

a group of people whose activity creates a certain discourse. However, a more detailed elucidation is needed so that the purpose of this publication can be properly ascertained.

3. Subjects to the obligation of legal argumentation

What particular types of lawyers we are referring to ? The first intuitive answer would be that, in this respect, the most important are lawyers-judges. In fact, when it comes to judges as subjects of legal reasoning, their understanding of acceptable arguments and rules of legal reasoning is shaped by their institutional position. On the one hand, they have the institutional power (usually, constituted by the Constitution itself or in the case of the Court in Strasbourg by the Convention and its protocols) to conclusively resolve any legal dispute with their decision. Such a role in solving disputes usually involves two essential elements of judicial position that jointly influence their reasoning and argumentation: impartiality in relation to the parties to the dispute and responsibility. Therefore, the judges' perceptions of the process of reasoning are by far the most complex and the most elaborate, and the obligation to publicly reason their own decisions further encourages accountability in the reasoning. On the other hand, due to their influence on the entire legal system, judicial reasoning is always somewhat creative and creational in relation to that system – which is something that judiciary must take into account when it builds its own canon of acceptable legal arguments.

Legal representatives of different profiles, or public defenders and prosecutors, for example, are in a fairly different situation compared to judges. Their "concern" (and responsibility) for the influence of their own way of judgment on the legal system and its harmonized and uninterrupted functioning is far smaller – even in the case of public officials, such as prosecutors. Their primary concern is the party that is represented in the dispute, and winning or losing the case. It follows that, from their point of view, reasoning and argumentation are equally important to the rhetorical "aspect" of their profession.

Finally, if the entire legal system, and in particular the legal reasoning, is observed from the perspective of legal science, that is, professors and law students, what seems to be in the front plan is the analysis of the process of reasoning and argumentation being carried outside everyday legal arena. It is not governed by any practical needs, but only by its cognitive purpose – to understand the legal system and its canons of acceptable legal arguments as a coherent and consistent system, regardless of possible discrepancies that the system "produces" in the course of its everyday functioning. Additionally, in comparison to judges or legal representatives, the doctrine can and should be much more critical towards the current practice of reasoning.

It should analyze and assess it in terms of certain non-legal social values, as well as in terms of justice and fairness.

Keeping all this in mind, although the definition of legal reasoning as the reasoning based on valid legal norms is still useful, sometimes it is important to specify to which of these subgroups of lawyers we are referring to when speaking about the legal (juristic) reasoning. It is important for the simple reason that an acceptable[8] doctrinal argument used in the abstract legal analysis of rights may be unacceptable or useless for a judge in the resolution of a concrete legal dispute.

8) Acceptable from the standpoint of the community of lawyers-scientists and theorists of law.

4. Chapter summary

Finally, to summarize the contents of this chapter in several related theses. The application of law is a kind of distinctive social practice. This practice is peculiar because, firstly, it is being dealt by distinctive legal institutions (such as courts)[9] and secondly, these institutions are made up of specially educated professionals who form a special way of legal (juristic) thinking and legal conventions of argumentation and reasoning of their decisions through a long and established practice of application of law.Therefore, the social practice of the application of law is not a mere legal reasoning *in accordance with the applicable law*, but is made from a set of principles, arguments, and canons of interpretation which legal professionals autonomously developed through their practice.

9) "Institutions" in this sense also include, for example, the professional associations of legal councillors or educational institutions in the field of law, and not just national or supra-national legal institutions, even though they are subject of our interest hereinafter.

When we talk about the forms of acceptable legal justification and reasoning, the most important for each legal system are those developed by the lawyer-judges from judicial institutions. This is due to their institutional position that gives them a dominant position in the interpretation and application of the current law. Consequently, it is clear how significant for each national legal system and the application of law within that system is the theoretical and dogmatic analysis of the case law of national courts in the field of legal argumentation and reasoning.

Finally, bearing in mind what has already been said in the introductory part about the importance and the institutional position of the Court in Strasbourg in the pan-European system of protection of human rights, it is necessary to emphasize the importance of the analysis of its case law for legal systems of the contracting states, at least when it comes to the practice of implementation of the Convention and the protection of the guaranteed human rights. This importance is even greater, as the Court in Strasbourg, after establishing the right to a reasoned judgment under Article 6 of the Convention, *authoritatively establishes a set of binding minimum standards for valid argumentation and reasoning of court rulings of national courts.*

CHAPTER II

The general position of the Court in Strasbourg in the protection of human rights guaranteed by the Convention

1. Introduction

It is difficult to properly understand the decisions of the Court in Strasbourg brought in individual cases between the petitioners and the state, regardless of whether the applications in question and the relevant decisions refer to the violation of Article 6 of the Convention, which is the subject of our attention, or the violation of human rights guaranteed by the other articles of the Convention, without understanding the general position of the Court in the protection of human rights guaranteed by the Convention. When we discuss the general position of the Court, first of all we have in mind its (1) place and function in the human rights protection system established by the Convention, (2) mode of operation on the basis of which the Court realizes its functions, and which is established by the Convention, accompanying Protocols and court practice, and ultimately (3) the principles on which the Court bases its judgments and methods of interpretation of the Convention, which became its common argumentative framework in making decisions, through the practice. We will examine each of these questions, mainly focusing on the last of them – the issue of methods of interpretation and application of the Convention – as it is of the utmost importance for the topic of this publication.

2. Position and function of the Court

The very Preamble to the Convention signed by contracting states that it is based on the "common heritage of political traditions, ideals, freedom and the rule of law". Since one of the pillars of the idea and practice of the rule of law is the principle of separation of powers, it is not surprising that this principle is considered as one of the key elements of the system of protection of human rights guaranteed by the Convention. More importantly, one of the key elements of the separation of powers is an independent judiciary, so that this particular principle, in a specific way, applies also to the functioning of the Court in Strasbourg. Therefore, the first word that needs to be mentioned when talking about the place and function of the Court in Strasbourg is the word "independence". Although there are some open questions with regard to the relations between the Court and the Council of Europe, it is unquestionable that any interference in the work of the Court, on behalf of any European or national institution, would be considered unthinkable and unacceptable violation of the independence of the Court. Moreover, in its relations with national authorities of the contracting

states, the Court insists on its own independence and through its judgments "reminds" the national governments of their obligation to provide the same kind of independence to the national judiciary.[10]

10) Luzius Wildhaber, "The European Court of Human Rights in Action", Ritsumeikan Law Review, Vol. 21/2004, p. 89, i.d.

However, if we are specifically talking about the position of the Court in the system of human rights protection established by the Convention, it is of essential importance to mention its jurisdiction. Based on the provisions of the Convention and the corresponding Protocols it can be said that this jurisdiction is fundamentally twofold. First, the Court in Strasbourg has jurisdiction to resolve disputes between individuals and the state (less frequently between the two countries), that is to decide on individual petitions by individuals who believe that certain rights and freedoms guaranteed by the Convention have been violated. This way, the Court takes care of the so-called individual justice. However, there is a possibility for the Court to voice its opinion in cases of petitions which raise serious or new questions regarding the application or interpretation of the Convention. The Court then exercises its right to give an authoritative interpretation of the Convention and by resolving a case it does not deliver individual justice, but somehow establishes a general standard of righteousness (constitutional justice) through the development and interpretation of the Convention.[11] It was exactly this duty that the Court emphasized in deciding the case of *Ireland v. the United Kingdom* (5310/71, § 154). In particular, by identifying its role in the implementation of the Convention, the Court in Strasbourg expressed the view that the judgment did not serve only to solve individual dispute in a petition submitted to the Court, but, far broader, to clarify, preserve and develop the rules set by the Convention, thereby enabling the states to carry out their obligations as contracting parties to the Convention.

11) Luzius Wildhaber, "The European Court of Human Rights in Action", Ritsumeikan Law Review, Vol. 21/2004, p. 89, i.d.

3. Operation of the Court in Strasbourg

Another important issue concerning the Court's general position stems from what has just been said about its competence. It concerns the issue of its functioning when delivering judgments. We will focus only on one vital aspect of the functioning of the courts in general, which is crucial to our topic. Namely, the theory,[12] generally speaking, recognizes two ideal-typical models of functioning of the courts, that is, two ways in which courts deliver and justify their decisions. The first is typical of the civil law systems and the other of the systems which nurture common law tradition. If we are to roughly portray the differences between the two systems of ruling and reasoning of judgment, we could notice two basic differences. The first is that the courts in the civil law system are prone to reach their decisions unanimously (if we talk about the decisions delivered by judicial panels). Even if a decision is not unanimous, the reasons for possible dissenting opinions are not clear, that is, one can hardly discern the points of

12) George Letsas, Judge Rozakis's Separate Opinions and the Strasbourg Dilemma, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1872384.

contention between the judges in the panel. On the other hand, the rulings of such courts seek to ascertain what is right in the particular case and the judges are, primarily, as Montesquieu vividly put it in his in Spirit of the Laws, "mouths" of the laws, and not creators of new rules. This affects the content of the reasoning behind such judgment which in turn becomes more formal, declarative, with descriptive and short reasoning avoiding doctrinal consideration of substantive issues that would be resolved conclusively and thus setting rules for future rulings in similar cases.

In both mentioned points, things are different when it comes to the courts that adjudicate in systems that originate from the common law tradition. First, decisions of these courts are often not reached unanimously by all judges in the panel. More importantly, the disagreement between the judges becomes evident from the statement of reasons for the judgments themselves through the instrument of the separate opinion of those judges who remain in the minority, having dissenting opinion, or judges who agree with the decision of the majority, but for different reasons and under different arguments, known as having concurring opinion. Naturally, the dissenting opinion in the context of this system is legitimate only if it is well argumented, that is, if it is based on arguments that are well reasoned and principled, because it serves not only to settle the subject matter of the given case, but can potentially be used as the ground for solving similar disputes in the future. This leads us to another important point of differentiation between the two systems of functioning of the courts – the way the reasoning of the judgment appears. A reasoned judgment in this system is the "place" where, side by side, stand competing legal arguments based on substantive moral principles that are systematically developed and purified. Over time, such principles develop into legal rules (creating legal precedents), since in common law, historically speaking, judges were often not able to ground their decisions in the existing legal rules. However, this dual role of judges and courts in the system (to be those who impose justice and rights, but also those who create law) made the common law system of adjudication as we know it today. First, one cannot expect that creation of a precedent among all the sitting judges will always lead to unanimity regarding the principles that will solve a concrete dispute and which will serve in future as the applicable law, just as such a broad consensus is never present within a legislative body which creates general legal rules. Hence, the dissenting opinions are common practice. And second, because in such cases judges do not follow existing rules, but rather create new ones, for the sake of the legitimacy of the precedency and for the sake of removing doubts about their arbitrariness, judges are, in some way, encouraged to be detailed and persuasive in justifying their decisions.

This is why not only dissenting opinions often tend to be long treatises on principles or rules that need to solve the case, and to become the precedent for the future, but the judgment as a whole as well.

If we examine the way the Court in Strasbourg functions through the prism of the aforementioned divisions, we will clearly perceive that in both regards it is closer to the common law tradition than to the civil law judiciary. First of all, the unanimous judgments of Chambers are becoming the exception rather than the rule and some of the "dissenting opinions" exemplify real, small, argumentative "revolutions" which give births to debates about substantive principles on which the Court (should) make decisions in the future. Second, and more important for the understanding of the functioning of the Court in Strasbourg, is that in reasonings of its judgments, which are long, discursive and well-argued, we find both questions and developments of the old principles, as well as the establishment of new substantive principles which serve as the ground for the final decision and the basis for future judgments in similar cases. In short, the judge of the Court in Strasbourg does not resemble Montesquieu's image of the "mouth" of the laws, but is often their creators.[13]

13) This is, after all, clear in the example of the right to a reasoned judgment and standards of good argumentation and reasoning that are the main subject of this article.

All things considered, the very mode of the operation of the Court in Strasbourg reveals how this Court expands the scope of rights and freedoms established by the Convention and how its decisions are reasoned. As it has been said, this mode is very close to the mode of operation of the courts in the common law system. However, when it comes to reasoning of the judgment, it should be noted that the practice of thorough and thoughtful reasoning of court decisions is certainly not associated with just one legal system, and that it stems from the fundamental principles of the rule of law which serves as a basis of modern legal systems of democratic states; from the right to fair trial, which is an integral part of the Convention and other international and national legal documents; and finally, from the practice of the Court in Strasbourg. Therefore, the obligation of delivering a reasoned judgment, giving valid reasons for the decision, and fostering the practice of good arguments and interpretations, are mandatory for the courts (and tribunals in general) in the context of all those national regimes that aspire to call themselves democratic. In the main section of the publication, we will review the standards of judgment implied by this obligation from the standpoint of the Court in Strasbourg.

4. Doctrines and interpretative principles of the Court

None of the interpretative principles of the Court has an objective meaning to be identically and directly applied in every situation. This was stressed already in the first section of this text: acceptable arguments in a legal judgment are not a ready-made recipe, nor they all lead in the same direction – towards some sort of a right decision in every case. Very often, accepted principles and interpretative arguments are in conflict with each other, and it is upon the decision maker, again, by relying on certain principles, to determine which of them will be given priority when reaching the final decision.

However, it is very important to be familiar with the most important interpretative rules and the principles which the Court in Strasbourg most often states as the reasons for its verdicts, because they can serve as a heuristic means for predicting future decisions, and, thus, for the interpretation and application of national law in line with the practice of the Court in Strasbourg.

Generally speaking, the Court in Strasbourg established itself through its decades-long practice as a dynamic and creative interpreter of the provisions of the Convention, because its practice, more or less, led to what we have in the first chapter labeled as the list or the inventory of acceptable principles and interpretative arguments. Using these principles and arguments, and approaching the Convention with methods of purposive and evolutionary interpretation, this Court got into a position to be an active actor in the extension of content and quality of human rights and freedoms guaranteed by the original text of the Convention.

As for the principles and interpretative arguments used by the Court, in this section we will be concerned with the few most important ones, which the Court usually employs in interpretation and application of Article 6 of the Convention. These are, primarily, the principle of subsidiarity (and the corrolary principle of the fourth instance) according to which the mechanism of protection of human rights, which was established by the Convention, is complementary or subsidiary to the national legal systems of the contracting states, which bear the primary responsibility for realization and protection of human rights under the Convention. In addition to this principle, in the application of the Convention, the extremely important role belongs to the principle of effectiveness according to which human rights and freedoms protected and guaranteed by the Convention are not "theoretical or illusory but practical and effective". Also, through its jurisprudence, the Court fully affirmed the principle that the Convention is a "living instrument", which implies the interpretation of its provisions in accordance with contemporary circumstances, and not in accordance with the intentions of the creators of the Convention. Finally, along with the

three aforementioned principles, the principle of proportionality also plays an important role in interpreting the Convention through finding a balance between public and private interests. The purpose of this principle is that the limitations of human rights for the sake of public interest must be justified with sufficiently important reasons, and that the limitation must be proportionate to the aim of the restriction. Throughout this chapter, each of these principles will be analyzed in more detail.

4.1. The principle of subsidiarity and the fourth instance doctrine

In the broadest sense, the principle of subsidiarity could be defined as a principle of vertical division of power between at least two different levels of government in a way that they share jurisdiction according to the principle of efficiency within the same matter. This means that the division of authority is based on the idea that the actions to achieve the objectives for which the jurisdiction has been established will be undertaken by the level of government that can perform them more effectively. In this regard, it should be noted that this is, most commonly, the lower level of government, because it is closer to the citizens, in a more direct relationship with them and enjoying greater legitimacy. Consequently, it is in a better position to effectively estimate measures which should be taken, and eventually to implement those measures.

In one of its judgments, the Court in Strasbourg noted that "the mechanism of protection of fundamental rights established by the Convention is subsidiary to the national systems of human rights protection."[14] In another judgment, referring to Article 1 of the Convention which stipulates that the contracting states, within the limits of their jurisdictions, are obliged to guarantee and protect the rights and freedoms set forth in the Convention and that the main mechanisms for the protection of these rights are their respective national legal systems, the Court pointed out that its role was merely supervisory, in accordance with the principle of subsidiarity. Thus, the system of protection of human rights and freedoms, defined in the Convention, whose part is the Court in Strasbourg largely relies on the principle of subsidiarity,[15] i.e. the principle stating that contracting states have primary responsibility for the implementation and protection of those rights and freedoms.

A typical example of how the spirit of this principle is embodied and concretized through the text of the Convention is the admissibility criterion petitions. Article 35, paragraph 1 of the Convention states that "the Court may only deal with the matter after all domestic remedies have been ex-

14) Sisojeva et al. v. Latvia, 60654/00, § 90.

15) Sisojeva et al. v. Latvia, 60654/00, § 90.

hausted." Another characteristic "derivative" of the subsidiarity principle is the so-called "margin of appreciation" according to which the contracting states are allowed to retain a certain discretion in the assessment of the exercise of human rights and freedoms guaranteed by the Convention, that is, discretion as to the manner in which these rights and freedom shall be exercised in the concrete conditions of a particular state. Finally, a "derivative" of the principle of subsidiarity, which is of particular importance to the subject of this publication, is a principle which is not regulated by the Convention, but established through the practice of the Court and which is closely related to the application of Article 6 of the Convention. This is the so-called the fourth instance principle or doctrine.

In a series of judgments, the Court in Strasbourg emphasized that its role was not to decide as the court of appeal, or as the Court of third or fourth instance[16] and to examine whether the judgments of national courts were made in accordance with the relevant national laws. In this sense, unlike conventional appellate court in a judicial system, the Court in Strasbourg does not deal with, for example, establishing whether the evidence in the proceedings was gathered in accordance with domestic laws, if the national court properly assessed the evidence, whether the court correctly interpreted the relevant domestic legislation, that is, whether it properly resolved legal issues and finally, whether the judgment was handed down in accordance with national legislation. Or, as the Court succinctly summed up in one of its judgments: "According to Article 19 (art. 19) of the Convention, the Court's duty is to ensure the observance of the engagements undertaken by the Contracting States in the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court *unless and in so far as they may have infringed rights and freedoms protected by the Convention."*[17]

16) Hence the name of this principle, although more appropriate name for this principle, taking into account its content, would be the "principle of the non-fourth instance".

17) Schenk v. Switzerland, 10862/84, para 45

In one of its recent judgments, the Court further specified that its task was not to assess the facts that led a national court to decide in certain way and not in the other way. The application of the fourth instance doctrine means that the arguments which the applicant submitted before a national court, and which were dismissed by the very court, cannot be accepted by the Court in Strasbourg.[18]

18) Tautkus v. Lithuania, 29474/09, § 57

Nonetheless, like other interpretative principles, the fourth instance doctrine is not an absolute and exceptionless principle which, when applicable, overrides all others principles. It is true that the application threshold is high, but it is still a threshold – it is something that the Court may at times "cross." After all, if this were not the case, the Court would never, for

example, come to the idea that the reasoning of the judgment of a domestic court has to meet certain standards in order to be in compliance with the *right to a reasoned judgment.*

In one of the judgments, in which the threshold was not "passed", the Court hinted what constitutes this threshold. In this judgment, the Court rejected the applicants' petition which was based on the allegation that the domestic courts had reached a decision against the applicant without sufficient evidence. At the very beginning of the judgment, the Court reiterates the principle of fourth instance and points out that the national court is in a better position to assess the credibility of the witnesses' statements and other evidence of relevance in the present case, and notifies that "the Court finds no element which might lead it to conclude that the domestic court acted in an arbitrary or unreasonable manner in establishing the facts or interpreting the domestic law."[19] So, the threshold principle is relatively high: in the operation of the national court there must be an apparent arbitrariness or irrationality in order to have the Court in Strasbourg depart from the principle of "the fourth instance" and engage itself in a substantive review of the judgment made by the national court. In the aforementioned judgment, however, the Court has not engaged in explaining the meaning of the term "arbitrariness" or "irrationality". In another judgment, however, the Court mentioned this standard, believing that it was not violated since the conclusions of the domestic court were reached "after lengthy adversarial argument and in the light of all the materials assembled by the applicants' lawyers in support of their case."[20] Further specifying their understanding of what is "arbitrary" or "irrational" behavior of a domestic court, again in a negative way, the Court finds that "as long as the resulting decision is based on a full and thorough evaluation of the relevant factors [...] it will escape the scrutiny of the Court."[21] Therefore, the Court will not discuss the reasons that led the national court to conclusions on factual and legal issues of a particular case, but if these reasons do not exist or the reasons are contradictory or obviously arbitrary, then the judgement is unreasoned. In these cases the Court goes beyond the threshold of the fourth instance by determining whether the applicant's right to a fair trial, guaranteed by Article 6 of the Convention, was violated.

It is therefore clear that the Court occasionally decides as a court of appeal (as the third or fourth instance court) and thus acts contrary to the principle stating that the Court is not to assess the validity of the interpretation of national legislation or the way national legislation resolved the factual issues raised before the national court. As its jurisprudence shows, the Court is very active when it needs to examine whether the rights protected by Article 6 were respected. If necessary, it also "expands" those rights

19) Sebahattin Evcimen v. Turkey, 31792/06, § 25.

20) I.J.L. et al. v. the United Kingdom, 29522/95, 30056/96, 30574/96, § 99

21) Lalmahomed v. the Netherlands, 26036/08, § 37.

with its own practice. However, if the decision of the national court is based on the complete and overall assessment of all the factual and legal issues, the Court will invoke the fourth instance principle to avoid reviewing a decision of a domestic court.

4.2. Effectivness

The principle of effectiveness or efficacy is usually considered an integral part of every international system of human rights protection. It has been incorporated in the provisions of international documents, and it is being further strengthened through the application and interpretation by the supranational institutions that protect and guarantee the realization of guaranteed human rights. In terms of the Convention itself, the principle of effectiveness or efficacy is emphasized on several occasions as a basic principle in the protection of human rights and in resolving disputes that arise regarding the violation of the provisions of the Convention. Already in the preamble, the paragraph three states that the Convention "aims at securing universal and effective recognition and observance of the Rights therein declared", and that, on the other hand, the rights are best observed within the regime of "real political democracy". In addition, Article 13 of the Convention refers to "effective remedy" that should be available to anyone whose human rights have been violated, while Article 34 requires contracting states not to "hinder in any way the effective exercise" of the rights of citizens to petition to the Court in Strasbourg.

However, what is more significant for our topic is the interpretative significance of this principle. First, in its judgments the Court often refers to this principle, when the petitions raise the issue of the effective implementation of any of the Convention rights.[22] Other international documents also contain provisions that call for their effective implementation. The Vienna Convention on the Law of Treaties (1969) is crucial in this respect. In a number of its judgments, the Court in Strasbourg Court insists on interpreting the provisions of the Convention outside the legal vacuum, and that its provisions must be interpreted in accordance with the norms and principles of Public International Law, and in particular with the provisions of the aforementioned Vienna Convention.[23] Since the Vienna Convention, in its Article 31, among other things, points out that the provisions of international treaties should be interpreted (1) in good faith and (2) keeping in mind the purpose which is derived from its preamble and text, it follows that the principle of effectiveness and efficacy is, without doubt, one of the main interpretative arguments of the Court in making many of its judgments, while it is an inherent element of the both provisions of the Vienna Convention ("interpretation in good faith" and "teleological interpretation consistent with the text of the preamble [...] ").[24]

22) Airey v. Ireland, 6289/73; Bellet v. France, 40832/98, § 38

23) Compare: Loizidou v. Turkey, 15318/89, § 43;
Al-Adsani v. the United Kingdom, 35763/97, § 55;
Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland, 45036/98;
Demir and Baykara v. Turkey, 34503/97, § 67.

24) Richard Gardiner, Treaty Interpretation, Oxford: Oxford University Press, 2008, 160.

4.3. Convention as a "living instrument" – evolutionary interpretation of the Convention

For quite some time in its practice, the Court in Strasbourg has been applying the principle according to which the Convention should be interpreted as a "living instrument" or, to use the more common phrasing of our legal tradition, it should be interpreted in an evolutionary manner.[25] The Court has for the first time stated this principle in 1978 in the case of Tyrer v. The United Kingdom (5856/72) when it unequivocally stated that the Convention is a "living instrument which... must be interpreted in the light of present-day conditions" (§ 31).

In the application of this principle, the Court in Strasbourg has developed this idea in a series of subsequent judgments, so that contemporary legal theory holds that the principle of evolutionary interpretation, as applied by the Court, has three basic characteristics.[26] Firstly, in its interpretation of the Convention or its standards and terms, the Court almost never analyzes what the intentions of the creators of the Convention were and how they understood the meaning of standards and terms or what particular right they wanted to protect. It rather interprets them, as pointed out in the aforementioned judgment, in accordance with the "present-day standards" or as stated in yet another judgment[27] "in the light of present-day conditions". Secondly, when it comes to "present-day standards", the Court first of all has in mind the common or general standards adopted by the contracting parties.[28] For example, if corporal punishment is a generally prohibited or outdated sanction in contracting states, the Court will consider it as a general contemporary standard that will be applied in the specific case in which the State violated the standard and accept the applicant's petition. Finally, it follows that in its examination of acceptable standards of human rights protection, the Court will not be taking into consideration how these standards are understood in the state that is in dispute before the Court, not only by public opinion, but also by legislator. The third characteristic of the principle of evolutionary interpretation deserves further attention, because it reveals another important principle that the Court often resorts to in the interpretation of the Convention, and not only when using evolutionary interpretation. It is the so-called doctrine of "autonomous meaning" of the words of the Convention. According to the "doctrine", the terms of the Convention have their autonomous meaning, and shall be interpreted within the Convention, and not on the basis of what they mean in the respective national laws.[29] The meaning of a certain term (for example, the terms such as "court" or "criminal sanction" or "civil rights and obligations") in the domestic law of the state participating in the dispute before the Court, can be merely the starting but

25) Radomir Lukić, Teorija države i prava, vol. II, Beograd: Naučna knjiga, 1958, p. 230 i.d.

26) George Letsas, "The ECHR as a Living Instrument: Its Meaning and Legitimacy", http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2021836.

27) Rantsev v. Cyprus and Russia, 25965/04, § 272-282.

28) This does not mean that the Court will apply such a "modern" standard only if that there is a consensus around it, i.e. that all (other) contracting states adopted or legalized it. Moreover, recent practice of the Court in Strasbourg seeks to accept "today's common standards" in the sense of more and more certain abstract meanings which are being shown through the existence of certain international concepts (not ratified by most states) and the trends that exist in the development of various social beliefs (see Tyrer v. the United Kingdom, No. 5856/72, § 183; recent judgements include for example: SW v. the United Kingdom, 20166/92, § 43; Ünal Tekeli v. Turkey, 29865/96, § 62).

29) Engel et al. v. Netherlands, 5100/71; 5101/71; 5102/71; 5354/72; 5370/72.

not necessarily the end point of interpretation. As it has just been explained, this is particularly evident in the evolutionist interpretations of some terms of the Convention, because on such occasions, the Court ignores the way in which the standards of the Convention are interpreted in the national laws of the states which are in dispute before the Court. As will be shown later, "the doctrine of autonomous meaning" is often used in interpreting the articles of the Convention, including Article 6.[30]

It can be concluded that the Court's practice turned the Convention into a dynamic instrument able to adapt to the contemporary needs, that is, to provide answers to controversial situations that neither existed nor could have been imagined when the Convention was drafted – such as disputes related to transgender people, same sex relationships, children born out of wedlock, corporal punishment and so on. In addition to this, although evolutionary interpretations more often occur with respect to the violation of some other articles of the Convention, in one of its decisions, the Court noted that Article 6 should be interpreted in the light of modern conditions, while taking into account the prevailing economic and social conditions",[31] which is why additional attention was paid to this particular principle of argumentation.

4.4. Proportionality analysis as the form of applying human rights norms

The right to a reasoned judgment is, like other rights of the Convention, a human right. The norms establishing human rights in a legal system can be formulated either as legal rules or legal principles. When formulated as legal rules, the court activity consists in determining whether a national authority acted contrary to the operative facts of the legal rule establishing a human right. If the court finds that the activity that is contrary to the operative facts of legal rule is taken, the court is obliged to rule that the state authority infringed a human right. If it is prescribed, for example, that labor disputes must be resolved within two years, the court which conducted the proceedings for a period of two years and six months clearly violated a person's right to trial within a reasonable time.

Despite the fact that human rights are often standardized as rules (trial within a reasonable time is an example of this), in most of the cases human rights norms do not prescribe conditions for their own application, but instead provide prima facie imperatives. What does this mean in practice? Freedom of movement is, for example, an integral part of the Convention, but also of the majority of modern national constitutions, including the Constitution of Montenegro (Article 39). If the local authorities block one part of the city and prevent citizens from moving freely, in order to lawfully ren-

30) Autonomous concepts are the terms of the Convention, which (may) exist in the national legal systems of the contracting states, but which, in practice of the Court, as already explained, acquire autonomous meanings in relation to the meaning that these terms (can) have in national legislation. The most important features of the autonomous concepts are: they are not easy to define, they are often inconsistent with the mainstream legal theory, they have no basis in comparative law and they are subject to development (see: Dragoljub Popović, Postanak evropskog prava ljudskih prava: Esej o sudskoj kreativnosti, translated by Vanja and Miodrag Jovanović, Belgrade: Službeni glasnik, 2012, pp. 131-132). The fourth chapter is dedicated to the understanding of the Court what institutions may acquire status of tribunal in the national law, so this doctrine and its significance for the subject of this publication will be best understood then.

31) Marckx v. Belgium, 6833/74, § 41.

ovate streets and facades, one may ask whether the freedom of movement is violated. It is impossible to address this question by checking whether the state body in question fulfilled the condition or operative facts of the freedom of movement, since the norm establishing freedom of movement is – unconditional. The text of the relevant norm merely states that "the Constitution guarantees freedom of movement [...]". In this sense, it might seem that the norms of human rights are mere proclamations, since they are unconditional and, hence, not legal rules but in fact legal principles. The practice of constitutional courts around the world and the practice of the Court in Strasbourg show that this is not the case. Legal principles are applied differently from legal rules, but they are nonetheless routinely applied by the courts.

When faced with a potential violation of some principles concerning human rights, the court is obliged to do the so-called proportionality analysis. Proportionality analysis is the mode of application of legal principles, i.e. the way to apply human rights norms. Its aim is to examine whether the act of the state organ violated certain human rights and to what extent. For the Court in Strasbourg, proportionality is the basic principle upon which it is assessed whether state authorities restricted human rights in a justified manner or not. The basic intention behind the weighing of proportionality is to establish proportionality between public goals and individual rights in a democratic society, in a way that human rights will not be restricted more than necessary. In theory, proportionality analysis involves four basic steps: 1. The judge determines whether the national authority had the competence to take such a measure; 2. The judge checks if the measure was reasonably linked to the explicit goal that was intended with the given norm; 3. The judge determines whether the measure is restricting a right more than it is necessary to achieve the explicitly statedgoal; 4. The judge "weighs" or "balances" by checking the benefits of the measures used by the government in relation to the "costs" incurred by restricting rights and decides on how to resolve in the particular case the conflict between the constitutional principle, upon which the measure is based, and the constitutional principle, upon which the right is based.

Let us return to our example of restrictions of the freedom of movement. (1) In the first step, the Court has to determine whether the local government authority had the competence to prevent the movement of persons and vehicles in order to undertake the reconstruction of streets and facades in the city. Article 32 of the Local Government Act of Montenegro clearly establishes that one of the responsibilities of local government is that it "shall regulate and ensure performance of the construction, recon-

struction, maintenance and protection of local and unclassified roads and streets in residential areas." It is implied that the local government can undertake certain measures within its competence. The answer to the first question is, therefore, positive – the state body is, in this case, legally competent to rebuild roads and facades. (2) The suspension or limitation of movement of a certain type is certainly necessary in order to reconstruct the facades and the streets, so connection between objective measure and goal is arguably reasonable. (3) The third question is whether the measure of restricting the movement limits the freedom of movement more than it is necessary to achieve the legitimate goal – the reconstruction of streets and facades. In our case it is clear that having in mind the enduring danger of unreconstructed streets and facades, as well as the fact that this is a temporary and minor restriction of movement, the prohibition of movement in a particular part of the city is necessary to achieve the goal without excessive damage to people and property.[32] (4) Finally, a sensible answer to the fourth question is that the restriction of freedom of movement, in one part of the city, for a short period of time, is insignificant compared to the benefits achieved by reconstructing the streets and facades in the city, so it is reasonable for the court to conclude that there exists no violation of right to freedom of movement.

In the interpretation of the Court, the proportionality analysis implies preliminary and main proceedings. Within the preliminary proceedings, the Court a) determines whether the state's measure restricts a human right, and b) whether the restriction of a human right is prescribed by law? The main part of the analysis of proportionality also includes several steps: 1) the court needs to determine whether the measure is legitimate, i.e. whether it is necessary in a democratic society. The court is justified in reaching conclusion that the state's measure restricting a human right is legitimate provided that a) it corresponds to a pressing social need, b) the measure is proportional to the specific goal of the measure, and c) the reasons provided by the state to justify the measure are relevant and sufficient. The limitation must be such that, while enabling the achievement of a legitimate social goal, it is minimally restrictive from the point of limitation of human rights.[33]

32) It is understood that certain issues in the context of the analysis of proportionality require evaluation. According to some legal theorists, in the context of the third question the judge is asked to assess whether the limitation of the human right is small, medium or significant and big, and upon this assessment he decides whether a human right is unjustifiably limited. Formal models of judicial decision-making are not, however, directly relevant for this study. Irrespective of speaking about the application of rules or the application of principles, the profession of judge, normally, implies estimation, interpretation and evaluation in accordance with the law, professional ethics and his own conscience.

33) See for example: Hadjianastassiou v. Greece, 12945/87, § 41-47

CHAPTER III

Article 6: Right to a fair trial

1. General remarks about the Article 6. of the Convention

Article 6 of the Convention guarantees the right to a fair trial. This article guarantees the procedural rights of the parties in civil proceedings (Article 6, paragraph 1) and rights of the accused in criminal proceedings (Article 6 paragraphs 1, 2 and 3). While the second and third paragraph of Article 6 contain provisions setting minimum standards for the rights of persons charged in criminal proceedings, the first paragraph is applicable in both civil and criminal proceedings. The text of this key paragraph reads:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Through the rights guaranteed by Article 6, the Convention affirms the principle of the rule of law that underlies democratic societies, as well as the indispensable role of the judiciary in the administration of justice.[34] Its content reflects the idea of the creators of the Convention that there is a need to set up the so-called "protective rights", i.e. rights that will enable effective protection of guaranteed basic freedoms, in addition to the rights that establish fundamental freedoms. Right to a fair trial under Article 6 (in particular, under paragraph 1 of that article) is the most important such right. It includes both organizational rights (for example, the right to an independent and impartial court), as well as the rights of a procedural character (for example, the right to a public hearing). When it comes to the latter, it is possible to single out rights relating to proceedings and rights relating to the court decision. Right to a reasoned judgment, which is the central topic of this manual, also belongs to the second group of procedural rights.

Article 6, paragraph 1 is not applicable in the matters of substantive fairness. The term "fair" is not to be taken in its ethical or legal sense, that is, in the sense that the sitting court has in mind when it seeks to make its judgments "fair". The meaning of the term "fair" (in phrases such as

34) Airey v. Ireland, 6289/73, § 24; Stanev v. Bulgaria, 36760/06, § 231.

fair trial or fair hearing) is interpreted primarily in the formal, procedural sense. This means that the Court in Strasbourg in its decisions relating to Article 6 deals with the question whether the applicant was given the opportunity to realize his/her claims before an appropriate authority ("Tribunal"), in proceedings in which he/she was given the same procedural opportunities as the opposing party to present arguments and evidence in support of his/her case, as well as to challenge the arguments and evidence of the opposing party. Also, the "fairness" of the proceedings is assessed as a whole, and a single irregularity may not be sufficient to make the process as a whole "unfair."[35]

35) Miroļubovs et al. v. Latvia, 798/05, § 103.

In evaluating the actions of a domestic court in the light of Article 6 paragraph 1, and following the principle of fourth instance, the Court doesn't usually examine if the national court properly applied national rules nor whether the legal and factual issues were resolved in accordance to these rules. So, hypothetically speaking, the decision of the national court that is being challenged can be based on true facts and in accordance with applicable national law, but due to the fact this Court deals with the procedural context in the broadest sense of the word, and does not solve factual and legal issues resolved by the decision, such a decision could, figuratively speaking, be rejected before the Court in Strasbourg. However, it should immediately be noted that, having in mind the principles of the doctrine of the fourth instance set out in the previous chapter, this principle should not be taken as absolute, since the Court itself sometimes goes beyond it, weighing its impact in accordance to other principles (first of all, to evolutionary and effective principle), especially in cases where the procedure is characterized by manifestly arbitrary or unreasonable actions by the national court.

Finally, although it applies to proceedings before the courts (how the Court understands the notion of tribunal, will be discussed in the next section), it should be noted that Article 6 paragraph 1, does not apply to proceedings before national constitutional courts when they make in abstracto decisions in the process of reviewing of the constitutionality and legality of general acts.[36] Only exceptionally may Article 6 refer to such review if it affects the outcome of the dispute which is the subject of the petition, to which Article 6 applies.[37]

36) Valašinas v. Lithuania, 44558/98.

37) Olujić v. Croatia, 22330/05, § 31–43.

2. Which rights are protected by Article 6, paragraph 1?

The answer to the question which specific rights are protected by Article 6, and in particular by its first paragraph, which is the focus of our attention, cannot be obtained through mere reading of the text. Moreover, the

list of these rights cannot be considered complete and final at any time. Why is this the case? The reasons for this stem from the interpretive approach of the Court regarding the provisions of the Convention, and this provision in particular. Using interpretative principles, which were discussed in the previous chapter (primarily, teleological and evolutionary arguments, bearing also in mind the principle of effectiveness), the Court constantly expands, purifies and redefines the scope of rights protected by the Convention. Proceeding from the rights explicitly mentioned in Article 6 paragraph 1, such as the right to a fair and public hearing, the right to an impartial and independent court and the right to trial within a reasonable time, the Court has created a series of more precise, but very tangible and important procedural rights and, thus, significantly "upgraded" the original text of the Convention.

In addition, most of the terms from Article 6, such as the term "civil rights and obligations", the term "tribunal" and the term "established by law," are interpreted by the Court in accordance with the principle of autonomous meaning of the terms of the Convention, as explained in the previous section, thus allowing the best application of the principle of effectiveness in the implementation of the Convention.

Of all the rights protected by Article 6 paragraph 1, procedurally speaking, the "primary" one is the right to a trial. It includes a universal right of access to trial, that is not expressly stated in provisions of paragraph 1 of Article 6, but the Court acknowledged it for the first time in the decision Golder v. The United Kingdom (4451/70), when it took the view that all the procedural guarantees stipulated by the given article would be useless if there had not been the possibility ("right") to initiate a court trial. This implies that an individual must be allowed to submit his/her case before a competent court, to be solved without unnecessary and inappropriate legal or practical obstacles. Furthermore, this implies that the contracting state is under duty – in criminal matters always, and in civil ones sometimes – to provide expert legal assistance, if it would necessary to make the right of access to trial effective. Also, the right to access includes the right to finality of judicial decisions and the right to enforcement of a final court decision[38] As the Court points out, this right is an integral part of the right to access to court because otherwise the provision of paragraph 1 of Article 6 would be ineffective, that is devoid of any real positive effect.[39]

The "second" key right under Article 6 paragraph 1 is the right to a "fair and public hearing". Through its jurisprudence, the Court has developed several other "sub-rights" or entitlements which are integral parts of this right. First, when it comes to the "fairness" of hearing, it refers to the process as a whole, not only to the oral hearing of the parties or the first

38) Hornsby v. Greece, 18357/91, § 40–45.

39) Burdov v. Russia, 59498/00, § 34 i 37.

instance procedure.[40] This means that the failure or violation of any right in any stage of the proceedings should not have a decisive influence on the assessment of whether the applicant's right has been violated, if such failure is corrected at a later stage. And as already mentioned, the question of whether the process was "fair" is quite separate from the question whether the decision of the national court was "right" or "wrong". In addition, in some of its decisions the Court concluded that "fairness" of hearing implies, and moreover requires, adversariality of the proceedings, which means that each party should be given the opportunity to become acquainted with the evidence and arguments presented by the opposing party, as well as to present objections to the evidence and arguments.[41] The logical "complement" to the principle of adversariality is another important procedural right or principle – the "equality of arms." This principle requires both parties to the proceedings shall be given equal opportunity to present their "cases", and to present their own arguments and evidence that work in their favor and not to be disadvantaged in this regard compared to the opposing party. In short, the principle of "equality of arms"[42] reflects the formal equality of the parties before the court.[43]

When it comes to the "publicity" aspect, the practice of the Court identifies four essential elements: the first is the right of a party to be present at the hearing before the court;[44] the second is the ability of the parties to effectively participate in the proceedings; the third aspect refers to the general public character of the proceedings, that is, the presence of the public[45] in general, which can be prohibited only for reasons that are specifically listed in the first paragraph of Article 6 of the Convention; the fourth element is the obligation of the court to make its ruling public. Finally, it can be said that this last element partly[46] includes the *right to a reasoned judgment.* [47]

Thus, at the end of this section dedicated to Article 6, we come to the right to a reasoned judgment. We will bring up just several remarks on this right, as an introduction to the text dedicated to the analysis of the Court's judgments in which it was established that this right has been violated. If we carefully analyze the rights under Article 6 paragraph 1, it can be observed that the Court in Strasbourg frequently deals with formal examination of compliance with the guaranteed rights mentioned in this article. However, in holding that the right to a reasoned judgment is part of the right of access to trial and the decision of the domestic court as to whether the applicant's right has been violated or not, the Court actually assesses whether a particular judgment of the national court, as such, appears to be contrary to the right to a fair trial, despite the fact that during the proceedings all procedural safeguards were respected.[48]

40) Monnell and Morris v. the United Kingdom, 9562/81, 9818/82, § 56.

41) Karpenko v. Russia, 5605/04, § 90.

42) Brandstetter v. Austria, 11170/84, 12876/87, 13468/87, § 41–69.

43) Neumeister v. Austria, 1936/63.

44) Ekbatani v. Sweden, 10563/83, § 24–33.

45) Riepan v. Austria, 35115/97, § 27–41.

46) We say "in part" because the right to a reasoned judgment is partly considered a derivative of the right of access to a trial.

47) Hadjianastassiou v. Greece, 12945/87;
Van de Hurk v. the Netherlands, 16034/90.

48) It can be said that the establishment of the right to a reasoned judgment has forced the Court in Strasbourg to depart from the doctrine of the fourth instance when deciding in cases in which this right is violated, because, then, it inevitably inspects the manner in which national courts have explained certain legal and factual issues, thereby scrutinizing the actual quality of these decisions, and not just their reasoning.

The right to a reasoned judicial decision is the right to be informed about important reasons and clearly reasoned opinions of court on factual and legal issues, upon which the judgment was delivered.[49] Namely, it is not sufficient to merely inform the party about the court's final judgment, but it is necessary for the court to provide reasons and arguments why a particular judgment was passed. If contrary, the Court in Strasbourg will hold that the state had violated the right of a citizen to a fair trial under Article 6 of the Convention. Moreover, the Court will hold that citizen was deprived of a specific right under Article 6, the right of access to trial due to the practical impossibility to effectively benefit from remedy, because only a reasoned court decision allows for the higher instance – the court of revision – to examine the correctness of the actions of the lower court, to examine the procedures that led to the judgment of the lower court and to verify the logical coherence and justifiability of the conclusions of the lower court regarding the relevant factual and legal issues of the dispute in question.

It is widely accepted in legal theory[50] that the obligation to give reasons for judicial decisions guarantees "fair trial", because it: (a) enables the quality of the decision - obligation to provide sound reasons encourages and "pressures" the court to properly decide, better justify, and explain its decisions, (b) provides information about why the decision was made, on the basis of which parties can decide whether and where to seek remedy, and (c) represents a proof of honor and dignity of the subject whose rights are being decided.[51]

At the end of this chapter, it should be noted that the content of the right to a reasoned judgment needs to be distinguished from the content of the very reasoning of the judgment, according to the standards of valid reasoning that was established by the Strasbourg Court's jurisprudence. We will once again emphasize that this chapter was primarily dealing with the former issue. The latter and central issue of this manual will be further discussed in the next chapter.

49) Cornelis v. The Netherlands, 994/03.

50) More can be found in Denis J. Galligan, Due Process and Fair Procedures: A Study of Administrative Procedures, London: Clarendon Press, 1996, p. 431 and further.

51) Tadija Bubalović, "Pravo optuženika na obrazloženu sudsku odluku", Zbornik Pravnog Fakulteta u Zagrebu, br. 64, 2014, pp. 991-992.

CHAPTER IV

Reasoned judgment in practice of the European Court of Human Rights

1. Introduction

In the previous chapter, we emphasized that the Court in Strasbourg, following the doctrine of the fourth degree, does not oversee the alleged errors in determining facts or in interpretation of the law made by national tribunals. National tribunals independently assess the evidence presented to them and independently interpret and apply domestic law.[52] At the same time, the Court holds that the proper judicial activity, in terms of the right to a reasoned judgment, implies that the judgment made by tribunal must be adequately explained with the reasons on which they are based.[53]

The right to a reasoned judgment – a right to know relevant reasons and clearly reasoned opinions of the tribunal on facts and legal issues upon which the judgment was delivered – is based on the same principle as the Convention itself, which concerns the protection of the individual against arbitrary adjudication and which can be derived from the principle of the rule of law. Both principles in the judicial sphere serve to preserve public confidence in a fair and transparent judicial system, which is one of the foundations of a democratic society.[54] Reasoning in the practice of the European Court of Human Rights can be understood, in this respect, primarily as expressly stating the reasons for the judgment – reasons that are sufficient to respond to the essential factual and legal arguments of the parties, whether they are substantive, or procedural in nature.

Interpretative work of the Court in Strasbourg, which formulated the right to a reasoned judgment led to a significant number of judgments witch elaborated the concept of good reasoning under Article 6 paragraph 1 of the Convention.[55] The Court itself states the reasons why the right to a reasoned judgment stems from the meaning and purpose of Article 6, paragraph 1 of the Convention: (1) the decision must clearly show that the parties were heard and the reasoning itself suggests if the parties had a fair trial; (2) a well-reasoned decision allows a party to appeal against the decision – a decision that does not contain properly stated reasons does not allow the parties to challenge it in the adequate procedure; (3) just as it allows parties to seek legal remedy, a reasoned decision also allows the appellate body to review it; and finally (4) only a reasoned decision allows public consideration of the functioning and decision-making of courts and public authorities in general.[56]

52) Cornelis v. The Netherlands, 994/03.

53) Suominen v. Finland, 37801/97, § 36.

54) Taxquet v. Belgium 926/05, § 90.

55) It should be kept in mind that Article 6 paragraph of the Convention, based on the practice of the Court in Strasbourg, is applicable: 1) always when there is a genuine and serious dispute about "civil rights and obligations", not only in terms of the existence of such rights, but also in terms of their scope, and b) when the outcome of the proceedings directly affect the rights and obligations; it is not sufficient that the decision indirectly affected the rights and obligations (Chevrol v. France, 49636/99, § 44; Gorou v. Greece, § 27).

56) Tatishvili v. Russia 1509/02, § 58.

Criteria of reasoned adjudication can be systematized on the basis of the practice of the Court in Strasbourg and they can be listed as standards which judges within any national legal system would have to take into account in passing their decisions and in the formulation of the judgment. Consequently, judgments could be assessed without interfering, in the strict sense of the word, with the merits of the dispute. In the following sections, we will determine both the subjects to the obligation to give reasoned judgments, as well as the content of the given obligation.

2. Subjects to the obligation to provide a reasoned judgment: the concept of tribunal and status of the decisions made by tribunals

The concept of tribunal is fundamental for the proper understanding of Article 6, paragraph 1 of the Convention, as well as for understanding the right to a reasoned judgment. The Court in Strasbourg has defined tribunal autonomously – independently from national doctrines and practices. The cases of Sramek v. Austria (8790/78, § 36), H. v. Belgium (8950/80, § 50), Belilos v. Switzerland (§ 50), Benthem v. The Neatherlands (§ 40) generally settled the question of the definition of tribunal which is subject to the obligation of providing a reasoned judgement.

Tribunal, in the substantive sense of the word – the sense that it is essential for the practice of the Court – is primarily characterized by its judicial function, which entails deciding on matters within the competences of the institution, on the basis of legal rules, after the implementation of the envisaged procedure. Tribunals, therefore, are not only authorities explicitly referred to as courts in the national legal systems. The reasoning behind the aforementioned judgments of the Court confirms that the concept of tribunal includes all those bodies that fulfill determinate conditions which are provided either by the Convention or by the practice of the Court, irrespective of their designation within national law. Furthermore, in its judgment in the case of Van der Hurk v. The Netherlands (16034/90, §45) the Court found that the term tribunal necessarily implies "the possibility of making binding decisions which cannot be modified by non-judicial authority". In order to be considered a tribunal, an institution must have the power to make binding decisions; institutions that have advisory functions or merely give opinions do not meet this requirement.[57]

In the opinion of the Court, the exercise of judicial functions and binding character of its decisions are, nonetheless, not sufficient to make an institution a tribunal within the meaning of the Convention. The Convention itself specifies certain qualities which the Court often interprets as char-

57) Sramek v. Austria, § 36-42; Benthem v. The Netherlands, § 40.

acteristics without which an institution cannot be called a tribunal. These conditions are: (1) establishment by law, (2) independence, and (3) impartiality.[58] The concept of tribunal established by law means that (a) the authority shall not be established based on the discretionary power of the executive,[59] (b) the jurisdiction of the institution shall be established by law, i.e. it is not sufficient that it is established through customary rules. An institution which is not established by the "will of the legislature", as expressly stated in the judgment in the case of Pandjikidze et al. v. Georgia (§103-111), is necessarily deprived of legitimacy that is required in a democratic society.

Given the substantive definition of tribunal used by the Court, the criteria of independence, impartiality and establishment by law, under Article 6 paragraph 1 of the Convention, refer also to those bodies which are not courts, but in substantive terms perform judicial functions by examining all the factual and legal issues that are relevant for a particular case. Following this substantive definition of the term, in the course of its practice, the Court attributed the status of tribunal to institutions that were not traditionally considered judicial: bar associations,[60] military and prison disciplinary authorities,[61] regional administrative authorities for the transfer of real estate ownership,[62] authorities for the land sale,[63] land reform commission bodies,[64] and forestry commissions.[65] It was irrelevant whether the given body performed other functions in addition to judicial; it was only important if its function was judicial, in the aforementioned sense, during the process in the concrete case.

The independence and impartiality of the tribunal are interconnected and intertwined criteria. In cases such *Kleyn et al. v. the Netherlands* (39343/98, 39651/98, 43147/98, 46664/99), these two criteria were considered as unified. Whether a tribunal is perceived as independent or not is based on: the procedure for the appointment of its members, their mandate, the existence of guarantees for the elimination of external pressures, as well as on the public appearance of the body as the independent one.[66] The impartiality of the tribunal has its subjective dimension – which entails that the members of the tribunal should be free from personal bias, as well as the objective dimension - which entails that the body must take appearance of impartiality and that guarantees of independence in each particular case must be such as to preclude reasonable doubt in independence.

In an extraordinarily important case of *Chevrol v. France* (49636/99), the applicant had claimed that he was denied the right to a trial under Article 6 paragraph 1 of the Convention, so the Court dealt with the interpretation of its own practice in the case of *Beaumartin v. France* (15287/89). According

58) In the Court's practice, independence, impartiality and establishment by law are sometimes referred to as the criteria that a tribunal should meet, and sometimes they are referred to as the criteria that institutions have to meet in order to acquire the status of tribunal.
For the purposes of this publication, the following characteristics are seen as necessary conditions that every institution that aspires to the status of the tribunal must meet

59) Lavents v. Latvia, 58442/00.

60) H. v. Belgium, 8950/80.

61) Engel et al. v. the Netherlands, 5100/71; 5101/71; 5102/71; 5354/72; 5370/72.

62) Sramek v. Austria, 8950/80.

63) Ringeisen v. Austria, 2614/65

64) ETTL et al. v. Austria, 9273/81.

65) Argyrou et al. v. Greece, 10468/04.

66) Langborger v. Sweden, 11179/84, § 32; Kleyn etal. v. the Netherlands, 39343/98, 39651/98, 43147/98, 46664/99, § 190.

to Beumartin judgment, the tribunal can be only an institution that has full jurisdiction and meets the additional requirements of independence from the executive authority and impartiality towards parties (§ 38). In its Chevrol judgment, the Court specified that the term "full jurisdiction" refers to the concrete case considered before the institution (§ 76, 77). This definition of tribunal, in the case of *Van de Hurk v. The Netherlands* (16034/90), led the Court to establish the principle of inviolability of court judgment. The authorization given to another state body at the national level to change the effect of judicial decision, in whole or in part, is considered a violation of the right to a fair trial and a limitation of the independence of the court. The very definition of tribunal under Article 6, paragraph 1 of the Convention, in the Court's view necessarily implies that the binding decision cannot be altered by the body that is not a court.

This finally brings us to the definition of the term tribunal, i.e. to determining the subject of obligatory reasoned judgment, as well as the status of decisions of the institutions that are considered tribunals in the Court's practice:

- The tribunal is the authority that performs the judicial function independently of the executive power and impartially in relation to the parties to the dispute, whose function is to decide in a binding manner on matters within its competence on the basis of legal rules, following a procedure carried out in accordance with the law.

- The effect of the court decision may not, in whole or in part, be changed by another state body, and no legal act can be used to establish the authority for the state organ to change, in whole or in part, the effect of court decisions.

Of course, the stated Court's position on the inviolability of the decision of tribunal should not be absolutized. The decision of tribunal is inviolable in terms of the impossibility of being overturned by the executive authorities, but not in terms of being subjected to public appraisal and critical judgment. A reasoned judgment, which will be further discussed, is important so that the practice of a tribunal could be publicly assessed, on the grounds of the reasons set forth in its judgments, with the aim of establishing and maintaining public trust in the national judicial system.

3. Content of the obligation to provide a reasoned judgment

3.1. Obligation to provide reasons

The first and most important obligation that the Court in Strasbourg established in connection with the right to a reasoned judgment concerns the imperatives to have the judgment of the tribunal adequately explained by expressly stating the reasons on which the decisions were based. National tribunals are not required to give detailed answers to every argument of the parties to the proceedings,[67] but the Convention obliges courts to give sufficient reasons for their decisions.[68] Therefore, the first standard of reasoned judgment reads as follows:

- Tribunals are obliged to state appropriate and sufficient reasons for their decisions, i.e. they are obliged to justify their actions by giving reasons for their decisions.

Which particular reasons can be considered appropriate? The answer to that question to a large extent depends on the nature of the decision and can be evaluated based on the circumstances of each case,[69] taking into account the differences that exist in countries that have ratified the Convention with respect to the statutory provisions, customary rules, legal standpoints as well as differences in the drafting and publication of judgments.[70]

In a significant number of judgments, the Court has linked this obligation of tribunals at the national level with the right to a remedy and the possibility of public assessment of decision and its content. Only a reasoned decision can be subjected to review[71] and public scrutiny.[72] In addition, it is essential that the decision is appropriately based on national law. The petitioner in the case Tatishvili v. Russia stated that his right to freedom of movement and freedom to choose residence (Article 2 Protocol 4) was violated after the Russian police denied his application for registration, despite all the relevant documents were attached. Due to the lack of possession of residence registration, the petitioner was evicted from the apartment. The eviction decision was confirmed by the national courts, despite the interpretation of the Constitutional Court of the Russian Federation. The administrative organ and the national courts have not acted in accordance with national laws which entail binding interpretations of the Constitutional Court.

It was decided that there has been a violation of Article 6 paragraph 1 of the Convention, precisely because the national courts, despite hav-

67) Hiro Balani v. Spain, 18064/91, § 27; Gorou v. Grece 12686/03, § 37.

68) Ruiz Torija v. Spain, 18390/91, § 29, Van de Hurk v. the Netherlands, 16034/90, § 61, Gorou v. Grece, 12686/03, § 37.

69) Hirvisaari v. Finland 49684/99, § 30, Tatishvili v. Russia 1509/02, § 58.

70) Gorou v. Greece, 12686/03, § 37; Ruiz Torija v. Spain, 18390/91, § 29; Hiro Balani v. Spain, 18064/91, § 27.

71) Hirvisaari v. Finland, 49684/99, § 30.

72) Suominen v. Finland, 37801/97.

ing freedom in the choice of arguments and assessment of the evidence, were obliged to give reasons for their decision, i.e. to provide arguments in support of their decisions to the parties, so that they would be entitled to a remedy and so that the public could understand the basis of the decision. The following standard of a reasoned judgment arises from the aforementioned:

- Reasons on which the judgment was based are appropriate only if they a) allow the parties to make effective use of the right to a legal remedy, and b) are based on the applicable national law.[73]

In the case of *Barać et al. v. Montenegro* (47974/06) the court established violation of Article 6, paragraph 1, and ruled against Montenegro, because the decision was not based on the applicable national law. The applicants in this case filed a lawsuit in 2005 against their employer for avoiding to pay seasonal remuneration. The Basic Court in Danilovgrad in 2006 ruled in their favor and awarded each of them 150 euros for litigation costs. The Higher Court in Podgorica, on 26 April of the same year, overturned the decision, and ordered a solidary payment of litigation costs to the defendant, the employer, in the amount of 900 euros, referring to the Law on Amendments to the Labor Act of 2004. In February 2006, Constitutional Court declared the law unconstitutional, and the decision was published on 18 April 2006. In September 2006, the Supreme court rejected to review their petition. In November 2006, the applicants filed with the Court claiming that final judgment against them was based on a law that was not in force. The reason, upon which the Higher Court ruled, was not based on the applicable national legislation, so the Court detected violation of the right to a reasoned judgment.

3.2. Correcting argumentative flaws

The quality of reasons, in principle, falls within the freedom of national courts to interpret the law and evaluate the evidence. In each national legal system, the argumentation of a court leading to the decision can be subjected to the review of a higher court. As a rule, the court of revision can fully uphold the reasons in favor of a certain decision by the first or second instance courts. The revision courts can simply apply a particular legal provision to reject the remedy that highlights alleged legal deficiencies that have no chance of succeeding in the process of appellation. The practice of revision courts at the national level has been confirmed by numerous judgments of the Court in Strasbourg.[74]

However, in the case *Hirvisaari v. Finland* (49684/99, § 30-33), given the circumstances of the case, the Court departed from the principle that the

73) The practice of the Court in this regard has not yet been fully established, and there are initiatives within the Court to interpret right to a reasoned judgment in a wider sense.This may be seen from the separate opinions in the case of Gorou v. Greece stating that even authorities which are responsible for initiating legal remedies before the revision courts, must give a reasoned response to the requests of the parties. In this particular case, the answer is controversial due to the fact that the Greek legal system makes procedures before the Court of Cassation dependent on the discretion of the public prosecutor, and that public prosecutors often respond to the requirements of the parties to initiate proceedings before the Court of Cassation without providing any reasons, in a lapidary handwritten text on a piece of paper (partly dissenting separate opinion of judge Giorgio Malinverni, joined by judge Andras Sajo, § 5). Dissenting opinions have pointed out that establishing the absence of violations of the right to a reasoned judgment, the Court in this case reduced the scope of fundamental rights and acted contrary to its usual practice.

74) Salé v. France, 39765/04, § 17, Burg et al. v. France, 34763/02, Gorou v. Greece, 12686/03, § 41.

court of revision can reject an appeal by unconditionally supporting the reasons given in the decision of the lower court. The exception in question concerns the fact that the lower court's decision may be based on contradictory and inconsistent arguments. When this is the case, the Court takes the view that the revision court must make a statement regarding these inadequate, contradictory and inconsistent reasons, and must state its own reasons for the decision, regardless of whether the decision of the court of revision supports or revokes the previous decision. Accordingly, one may formulate a special obligation of revision courts in the context of the right to a reasoned judgment:

• If one of the main claims of the party in the revision procedure was that the argumentation of the first instance tribunal was inadequate, incoherent or contradictory, revision tribunals are obliged to correct deficiencies in the argumentation of the lower courts.

The right of the revision court to unconditionally support the reasons stated in the decision of the lower court is thus limited by logical qualities of argumentation, i.e. logical links between reasons upon which the decision of the lower court is based, taking into account the fact that basic argument of the party in the revision procedure may be that the reasons of the first instance tribunal were prima facie contradictory.

In regard to the actions of revision courts one should bear in mind that national legislation may lay down obligations which are more stringent than the express obligations under the Convention and under the practice of the Court in Strasbourg in relation to Article 6. In the case *Hiro Balani v. Spain* (18064/91), the Court takes the view that, in accordance with the Code of Civil Procedure of Spain (Article 1715), the Supreme Court is obliged to make a judgment on merits – which entails taking into consideration all of the materials submitted during the proceedings before the lower court – even if these materials were not expressly mentioned in the appeal (§ 28), except for "mere formalities or procedural issues" (§ 18).

• Revision courts must normally state their position on the key submissions of the parties if they have been the subject of the first instance proceedings, regardless of whether they were explicitly mentioned in the legal remedy; the silence of revision courts cannot be interpreted as a tacit rejection of the complaint.

The national legal system can and often needs to specify the conditions for a reasoned judgment which are requested from the courts of first instance and revision courts. The reasoning of the aforementioned judgments, in

that respect, refer to the provisions of Article 130, paragraph 3 of the Spanish Constitution which stipulates the obligation of reasoned judgments: Judgments contain the statements about the reasons on which they are based and which shall be public. Article 359 of the Spanish Code of Civil Procedure reads as follows: "Judgments must be clear and precise and should address the submissions and other statements that are presented in the course of the proceedings; they must state reasons for and against the defendant and decide on all the disputed points that were subjects of argumentation." These points must be specifically addressed in the judgment. Therefore, we have examples of legislative practice that could serve as a model for the legal definition of obligations of courts and tribunals in the national legal system of Montenegro. Article 120 of the Constitution of Montenegro stipulates, however, publicity of court hearings and sentencing, but the reasoning of a judgment is not explicitly mentioned. Since the Court in Strasbourg expressly states that Article 6 of the Convention should be interpreted in such a way that the publicity of the judgment necessarily implies a reasoned judgment, the obligation of the publicity of hearing and sentencing in the said Article of the Constitution of Montenegro should be also interpreted in this light.

3.3. Indeterminate legal concepts and clarity of judgment

The wording of the judgment, according to the case Lalmahomed in. The Netherlands (26036/08, § 43), must be sufficiently clear, because this is crucial for the protection against arbitrariness in which the right to a reasoned judgment is grounded. In *Taxquet v. Belgium* (926/05), the Court found that the questions to the jury, "had been formulated in such a way that it could not be ascertained why each of them had been answered in the affirmative," (§ 63), which indicates that the obligation of tribunal is to formulate its reasons in a clear way. Such laconic answers to general questions in the case of jury trials and insufficiently reasoned opinions in the case of tribunal decisions can, according to the Court in Strasbourg, reasonably lead parties to get the impression of arbitrariness due to the lack of transparency. As a result, in the Taxquet case it was decided that the challenged decision contained no reasons which the applicant could understand and accept.[75]

The right to a reasoned judgment does not include only the obligation of stating the reasons on which the judgment is based. It is necessary to state the reasons with "sufficient clarity".[76] This stems from the principles on which the right to a reasoned judgment is based – the rule of law and avoiding the arbitrary exercise of power - which enable the establishment and maintenance of public trust. *Suominen v. Finland* (37801/97) stresses

75) This decision is of particular importance partly because it questions the participation of lay jurors in adjudication. The Court explicitly states that its task is not to standardize different legal systems in member countries of the Council of Europe. Hence, in this case the Court decided (the Court is always trying to distance itself from the abstract review of legislation and institutional arrangements), that the jurors cannot be asked to give reasons for their decision (Taxquet v. Belgium, § 90).

76) Hadjianastassiou v. Greece, 12945/87, § 33.

that only a reasoned judgment, i.e. judgment supported with appropriate reasons may be subject to public assessment (§ 37); while the judgment *Tatishvili v. Russia* (1509/02) states that one of the basic functions of the right to a reasoned judgment is to allow public evaluation of the judgment (§ 58). This is possible only if the judgment is explained in an understandable way.

• The judgment must be worded clearly enough so that the public can understand it to the extent that is necessary to maintain public confidence in the judiciary.

Judgments based on legal standards that are not properly specified neither in normative instruments, nor in the practice of national tribunals, constituted the basis for the Court's decision in the case *H. v. Belgium* that there had been a violation of the right to a reasoned judgment. The applicant in this case was a Belgian lawyer, who was expelled from the Bar in Antwerp since it was established that he had given false information about the case to his t client, in order to obtain a direct material gain. The Appellate Court and the Court of Cassation in Brussels confirmed this decision in the appellate proceedings. The applicant, then, twice within several years, addressed the Chamber with requests to be readmitted and included in the list of lawyers, but on both occasions his requests were rejected. The Belgian legislation allows readmission after the expiration of ten years from the date of exclusion, provided that there exist "exceptional circumstances". The Court held that the imprecise character of the given legal concept makes it impossible for decision to be based on it, i.e. it was impossible to decide only on the basis of a legal standard. In the case *Jovanović v. Serbia* (32299/08, § 50), which primarily concerned the right of access to trial, the Court also noted that "the stipulated elements must be sufficiently developed and transparent in practice so that they can provide legal and procedural safety".

• Indeterminate legal concepts (legal standards) that are not sufficiently elaborated in the decision, through normative instruments or court practice, so that its content cannot be determined with certainty, have a limited effect in the proceedings, in the sense that the decision cannot be fully grounded in them.

3.4. Completeness of judgment and obligatory arguments

The interpretation of national legislation is not the task of the ECHR. This task belongs to courts at the national level, except in cases of "apparent arbitrariness".[77] However, it is upon the Court to determine whether the interpretation of domestic legislation is in accordance with the Convention.[78] In this respect, it can be expected from the Court to decide that the right to a reasoned judgment was violated if a national court failed to respond to certain arguments of the parties, or if it had not stated certain specific reasons in the explanation of the judgment.

77) Jovanović v. Serbia, 32299/08, § 50; Nejdet Şahin and Perihan Şahin v. Turkey, 13279/05, § 49-50.

78) Kuchoglu v. Bulgaria, 48191/99, § 50.

Despite the fact that the national courts are not required to respond to all the arguments of the parties to the dispute, the Court in Strasbourg has repeatedly stressed that the courts, taking into account the circumstances of the case, have an obligation to make clear judgment about all the key issues discussed.[79] In the case of *Lalmahomed v. The Netherlands* (26036/08, § 37) the Court upheld the judgment from *Monnell and Morris v. The United Kingdom* (9562/81, § 69, and 9818/82) that the decision must be based on full and thorough assessment of issues that are crucial for the decision. From these positions of the court it can be concluded that:

79) Boldea v. Romania, 19997/02, § 32; Taxquet v. Belgium, § 91.

- All the key issues of a case must be considered, and that this is so should be clear from the decision itself.[80]

80) Dissenting opinions in the decision Tautkus v. Lithuania (concurring opinion of Judges Danutė Jočienė and Isabelle Berro-Lefèvre points out that the judgment of the Court in Strasbourg cannot be based on arguments that were never brought before national courts) indicate the existence of divided opinions on issues such as whether consideration of the arguments that the applicant has not stated before the national courts represent a departure from the fourth instance doctrine . The doctrine of the fourth instance is always an important issue before the Court in Strasbourg, so the conclusion regarding permissible arguments has to be limited in scope. Van de Hurk, 16034/90, § 59, Perez v. France, 47287/99, § 81, Wagner and J.M.W.L. v. Luxembourg, 76240/01, § 89; Kraska v. Switzerland 13942/88, § 30; Barberà, Messegué and Jabardo v. Spain, 10588/83, 10589/83, 10590/83, § 68.

Article 6 paragraph 1 of the Convention stipulates the obligation of the court to "conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision."[81] In the case Kraska v. Switzerland (13942/88), one of the main arguments of the applicant was that the judge of the Swiss Federal Court, which tried the case at the national level, publicly said that he was not able to review the enclosed materials, because of their late delivery. According to the practice of the Court in Strasbourg, courts in a democratic societyare obliged to try to instill trust in the public and parties to the dispute. The impressions parties may get are important, but they are not decisive. In this particular case, the objectivity of doubts about one of the judges not being sufficiently acquainted with the case materials did not have to be proved, because it was confirmed by the judge himself. The applicant before the Court, nonetheless, has to prove that there is a grounded doubt that the tribunal was not properly briefed on the case before making a decision.

- Tribunal is obliged to examine the materials, arguments and evidences submitted by all parties, regardless of the impression about the relevance of all the materials, arguments and evidences for the decision-making process.

This obligation is particularly important in cases where the courts have ignored the arguments, materials and evidence crucial to the outcome of the court proceedings. In the case Ruiz Toria v. Spain (18390/91), the applicant contended that indifference of the second instance court toward his claim that the charges against him before the first instance court were not brought in a timely manner amounted to a violation of the Article 6 paragraph 1 of the Convention. The complaint about the time-barred action was submitted in writing, formulated clearly and precisely, with relevant evidence. The second instance court did not even decide on the complaint regarding the time-barred action (§ 11). The Court ruled that this constituted the violation of Article 6, paragraph 1, stating that it could not be concluded from the decision of the appellate court whether it implicitly rejected the complaint about the time-barred action, or simply ignored it. A reasoned decision on the complaint, i.e. had to be an integral part of the judgment in order for it to be considered reasoned. In Hiro Balani v. Spain (18064/91) the applicant filed a submission regarding the priority of trade mark before the national court, in the written form, in a clear and precise manner, citing the relevant evidence, but the court of revision did not comment on the submission, and so the Court established the violation of Article 6 Paragraph 1. In both cases, the court of revision had to expressly state its opinion about the applicants' claims; otherwise, in the opinion the Court, it cannot be concluded whether the court of revision simply ignored submissions that are of importance to the outcome of the dispute, or it intended to turn down the requests.

• If the submissions of the parties are of decisive importance to the outcome of the dispute, the response of the tribunal at the national level must be expressly stated in the judgment.

Following the practice of the Court in Strasbourg, the national court is obliged to address the key submissions of the parties concerning the reasoning in cases where the human right is potentially in danger of being violated, when such an issue is raised by the person whose right is threatened in the proceedings before national courts. The judgment in the case Wagner and J.M.W.L. v. Luxembourg (76240/01) shows that certain failures of national courts to review claims of the party, in relation to Article 8 of the Convention, can be understood as a violation of the right to a reasoned judgment (§ 96). In this case, the applicant insisted that the national court was obliged to consider his claims in detail. The Court ruled that the violation of Article 6 took place because national courts, especially courts of second and third instance, did not address allegations of the violation of the Convention right, in particular, the right to respect for private and family life.

• When there is a request of a party concerning the rights and freedoms guaranteed by the Convention, national tribunals are obliged to consider the request in detail and with care.

In *Brežec v. Croatia* (7177/10) the Court found that the decisions of national courts ordering the eviction from the apartment where the applicant had lived for over 35 years are not in accordance with Article 8 of the Convention, which stipulates the right to respect for private and family life. Article 8 lists all the situations allowing interference of public authorities with private and family life, but only to the extent that this interference is necessary in a democratic society. The submission was declared admissible exactly due to the central question of whether the domestic courts held that the eviction was measure that was proportional to the aim - the aim being the protection of the rights of the lawful owner. Despite the fact that the Court did not rule violation of Article 6 of the Convention in this case, it held that the analysis of proportionality must be applied in every case when a state measure threatens certain human right, i.e. when there is a risk of violation of a human right.

• Reasoned judgment must contain an analysis of proportionality whenever the subject of a judgment is the case where a state measure threatened human right or there is fear that a human right will be threatened.[82]

National courts in Croatia, therefore, acted in accordance with regulations on the national level, but they completely neglected the applicant's allegations concerning the proportionality of the measures of eviction due to the specific circumstances of the case. The lack of analysis of proportionality on behalf of the national courts has led the Court in Strasbourg to conclude that the courts did not adequately respect the right under Article 8 of the Convention. In previous sections we discussed the nature of the analysis of proportionality from the perspective of the Court in Strasbourg. The case of Brežec v. Croatia clearly establishes the obligation of the court to explicitly weigh the scope of the violation of a certain right with the competing protected public interest which restricts the given individual right.

The case *Lakićević et al. v. Serbia and Montenegro* (27458/06, 37205/06, 37207/06, 33604/07), also, with certain restrictions, stressed the importance of the court obligation to undertake an analysis of proportionality between the means used by state authorities and the intended goals. In this particular case, while ruling in connection with Article 1 of the Protocol 1 to the Convention, the Court decided that the applicants, who were ordered by an administrative authority to return an amount of their pensions in accordance with the applicable law, after the entry into force of a provision limit-

82) From the standpoint of legislative policy, which is not the subject of this manual, the Court takes the view that the person whose human rights are potentially threatened must have an independent tribunal within the national legal system, which will assess the proportionality and reasonableness of the measures that potentially threaten the right. In the given case, this implies that the analysis of proportionality in connection with Article 8 is required regardless of the fact whether the applicant has the right to live in the apartment, within the framework of the national legal system.

ing their pensions, were forced to take up excessively large and disproportionate burden (§ 72). Any measure that limits a right must be proportionate to the goal it intends to achieve (§ 61), and violation of the provisions of the Convention in this case could have been avoided by means of reasonable and proportionate reduction or enabling the transition period in which the applicants could have adjusted to the circumstances that were created with the entry into force of the new law (§ 72).

4. Courts practice

In the course of its existence, the Court attributed importance to the national jurisprudence in the context of Article 6 paragraph 1 of the Convention. This is evidenced by numerous judgments such as: *Reinhardt and Slimane-Kaid v. France* (23043/93, 22921/93), Meftah et al. v. France (32911/96, 35237/97, 34595/97), *Voisine v. France* (27362/95), Wynen v. Belgium (32576/96), and others. Judgments in question relate to the practice of all state bodies, regardless of whether these bodies have the status of the tribunal or not. In the case of *Gorou v. Greece* the court used the practice of the public prosecutor to assess whether the applicant in the proceedings before national courts actually used the remedy (§ 32-34). From this importance of practice at national level stem certain obligations of state authorities as particularly pointed out in the judgments *Jovanović v. Serbia* (32299/08, § 50) and *Nejdet Șahin* and *Perihan Șahin v. Turkey* (13279/05, § 56-57). In these judgments the Court took the following stance:

- State authorities, including tribunals, shall apply national laws in a predictable and stable manner.

In accordance with the doctrine of the fourth instance, the Court, in principle, does not set before itself the task of comparing the various court rulings at national level, granting that all legal systems allow for the possibility of differences in judgments even in similar or identical cases, even before the very same court. Yet, there are practical standards formulated by the Court in order to assess whether in the given case there had been any inconsistent court practice that led to a violation of Article 6, paragraph 1.

The judgment Iordan *Iordanov et al. v. Bulgaria* (23530/02) introduces an important criterion concerning the uniformity of court practice at the national level and is directly related to the right to a reasoned judgment. This criterion is further discussed and exposed in a more complex case of *Nejdet Șahin* and *Perihan Șahin v. Turkey* (13279/05). The stance that the Court took in those judgments was crucial for decisions in the case of *Tomić et al. v. Montenegro* (18650/09, 18676/09, 18679/09, 38855/09, 38859/09, 38883/09,

39589/09, 39592/09, 65365/09, 7316/10). The petitioners in the case *Nejdet Șahin and Perihan Șahin v. Turkey* stressed that the relatives of those who, along with their son, died in a plane crash managed to win the disputes before the national courts in Turkey, using identical or similar claims which they submitted to the Supreme marshal administrative court only to be rejected by it. Their claim was that the Article 6 § 1 of the Convention was violated. Given the peculiarities of the Turkish judicial system, with several supreme courts that interpret the law in parallel, the Court took the stance that periods of conflicting practices can be tolerated without compromising legal certainty. For this reason, the court in this case did not apply common criteria for assessing whether discrepancies in jurisprudence produce legal uncertainty which was established in the judgment *Iordan Iordanov et al. v. Bulgaria* (§ 48-49). The criterion is "deep and long-lasting differences in the court practice."[83]

83) Nejdet Șahin i Perihan Șahin v. Turkey, § 53.

• In the court practice at the national level, there should not be any deep and lasting differences in judgments regarding the same or similar cases.

The case *Ștefănică et al. v. Romania* (38155/02) shows that legal certainty does not exclusively apply to the uniform practice of the courts, but that it should be seen as an opportunity to trust the consistency of a unified approach by all state authorities involved in the resolution of a legal question. The Court clearly states the criterion that a normatively established measure at the state level (in this case it referred to the collective dismissal of workers from state-owned companies) must be conducted rationally, clearly and coherently, so that the actions of the state can be assessed with regard to the functioning of its legislative, administrative and judicial authorities (§ 32). In Romania, the district courts dealing with these disputes were the courts of last resort, and there was no adequate mechanism for harmonizing their practices (§ 36). It is common for the Supreme Court to perform harmonization of court practice, but this was not the case here. It is taken that the assessment of facts and interpretation of law by the basic courts can lead to different outcomes of disputes (§ 37). However, as it has been repeatedly noted above, inconsistent court practice could lead to reduced public confidence in the judiciary, thus undermining legal certainty and foundations of the rule of law (§ 38). It is important, in this respect, from the standpoint of the national legal system, that there exists a functioning mechanism that could ensure a uniform application of the law.

• The use of substantively similar legal norms on persons belonging to almost identical groups should be uniform, just as there must be a mechanism to resolve any potential discrepancies.

In its judgments regarding applications against Montenegro, the Court confirmed that its role was not to examine how national courts interpret domestic law, nor to compare the decisions of those courts. The deep and lasting differences in the practice of the highest national court can violate the principle of legal certainty, which is implicitly stipulated in the Convention, and, thus, constitutes one of the basic elements of the rule of law. In this regard the Court in Strasbourg determines whether there are deep and lasting differences in the practice of the Supreme Court, whether domestic law provides for a mechanism to overcome inconsistencies, and whether the mechanism was used in particular case and with what consequences. This brings us to one of the last standards of reasoned judgment that can be derived from the Court practice:

- Practice of the highest courts in the state must be consistent as much as possible. Consistency implies observance of the principle of legal certainty, which largely implies deciding in accordance with previous decisions of the highest courts in the same or substantially analogous cases.

5. The right to legal remedy and enforcement of judgments in cases against Montenegro

Apart from the judgments that are crucial for the right to a reasoned judgment, the main part of this manual dealt with judgments of the Court in Strasbourg which relate to Montenegro. Special attention was paid to the judgments in the cases *Tomić et al. v. Montenegro* and *Barać et al v. Montenegro*, which refer to the uniformity of the court practice and reasoned judgment, as well as to the judgment in *Lakićević et al. v. Serbia and Montenegro*, which partly deals with the analysis of proportionality.

Judgments in the cases against Montenegro thus far have usually not been directly related to the right to a reasoned judgment, but to other rights under Article 6 of the Convention. Expectedly, most of these judgments relate to the violation of the right to trial within a reasonable time. Judgments concerning the right to a remedy are equally frequent. It implies that the remedies which are available to petitioners before making a complaint have to meet the following conditions: 1) effectiveness (not only normative and theoretical, but also practical); 2) availability; 3) they must provide redress in relation to the relevant complaints; and 4) they must provide reasonable prospects of success.[84] Effective remedy is one that can be used to speed up the proceedings before the sitting court, or the one that can correct the delays that have already occurred, which has, for instance, been established in the case *Sürmeli v. Germany* (75529/01, § 99).

84) A. and B. v. Montenegro, 37571/05, § 56; Novović v. Montenegro, 13210/05, § 34; Stakić v. Montenegro, 49320/07, § 58; Boucke v. Montenegro, 26945/06, § 68.

All requests must be met in accordance with the circumstances of the case. It should be borne in mind that a constitutional appeal cannot be considered an effective remedy at the national level in terms of the right to trial within a reasonable time.[85]

85) Boucke v. Montenegro, 26945/06, §§ 75-79; Stakić v. Montenegro, 49320/07, §41

A particularly interesting group of judgments against Montenegro, from the perspective of the right to a reasoned judgment, concerns one of the previously mentioned topics that was not explained in detail. It is the stance of the Court in Strasbourg that the enforcement of judgment is part of the trial. In the case *Velimirović v. Montenegro* (20979/07) the Court held that Article 6 par. 1 of the Convention was violated, claiming that the right to a trial would be illusionary if a contracting state were to allow that final enforceable judicial decisions remain inoperative to the detriment of one party (§40). The Court has confirmed its position in the judgments *Mijanović v. Montenegro* (19580/06) and *Milić v. Serbia and Montenegro* (28359/05). Despite the fact that these judgments concern primarily the judicial politics, structure and relations of state authorities, the following standard of judgment can be derived from the above mentioned:

- Execution of judgment is an integral part of the trial, which implies that final and enforceable judgments must be implemented in practice.

STANDARDS OF A REASONED JUDGMENT

In the previous sections we discussed extensively the doctrine of reasoned judgment of the Court in Strasbourg, the decisions against Montenegro, particularly those concerning Article 6, as well as the basic tenets of the Court's decision-making processes. Upon these considerations, we have reached the following conclusions regarding certain basic rules and maxims related to a reasoned judgment. They are listed in the summary below:

1. Tribunals are obliged to state appropriate and sufficient reasons for their decisions, i.e. they are obliged to justify their actions by giving reasons for their decisions.

2. Reasons on which the judgment was based are appropriate only if they a) allow the parties to make effective use of the right to a legal remedy, and b) are based on the applicable national law.

3. If one of the main claims of the party in the revision procedure was that the argumentation of the first instance tribunal was inadequate, incoherent or contradictory, revision tribunals are obliged to correct deficiencies in the argumentation of the lower courts.

4. Revision courts must normally state their position on the key submissions of the parties if they have been the subject of the first instance proceedings, regardless of whether they were explicitly mentioned in the legal remedy; the silence of revision courts cannot be interpreted as a tacit rejection of the complaint.

5. The judgment must be worded clearly enough so that the public can understand it to the extent that is necessary to maintain public confidence in the judiciary.

6. Indeterminate legal concepts (legal standards) that are not sufficiently elaborated in the decision, through normative instruments or court practice, so that its content cannot be determined with certainty, have a limited effect in the proceedings, in the sense that the decision cannot be fully grounded in them.

7. All the key issues of a case must be considered, and that this is so should be clear from the decision itself.

8. Tribunal is obliged to examine the materials, arguments and evidences submitted by all parties, regardless of the impression about the relevance of all the materials, arguments and evidences for the decision-making process the decision.

9. If the submissions of the parties are of deciding importance to the outcome of the dispute, the response of the tribunal at the national level must be expressly stated in the judgment.

10. When there is a request of a party concerning the rights and freedoms guaranteed by the Convention, national courts are obliged to consider the request in detail and with care.

11. Reasoned judgment must contain an analysis of proportionality whenever the subject of a judgment is the case where a state measure threatened human rights or there is a fear that a human right will be threatened.

12. State authorities, including tribunals, shall apply national laws in a predictable and stable manner.

13. In the court practice at the national level, there should not be any deep and lasting differences in judgments regarding the same or similar cases.

14. The use of substantively similar legal norms on persons belonging to almost identical groups should be uniform, just as there must be a mechanism to resolve any potential discrepancies.

15. Practice of the highest courts in the state must be consistent as far as possible. Consistency implies observance of the principle of legal certainty, which largely implies deciding in accordance with previous decisions of the highest courts in the same or substantially analogous cases.

16. Execution of judgments is an integral part of the trial, which implies that final and enforceable judgments must be implemented in practice.

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