THE IMPACT OF THE
ECHR ON DEMOCRATIC
CHANGE IN CENTRAL
AND EASTERN EUROPE

Judicial Perspectives

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The supremacy of the European Convention on Human Rights: Armenia’s path

ALVINA GYULUMYAN AND DAVIT MELKONYAN

1. Introduction

The European Convention is an international treaty of human rights concluded between States to the benefit of individual users (beneficiaries), that is, people in the jurisdiction of contracting States. Through this treaty States establish an objective regime on human rights upon which anyone can call.¹ Since the European Convention does not precisely define its status in the national legal system of the signatory State, each State is allowed to define the status of the European Convention within its own system. The European Court of Human Rights (ECtHR) has reiterated a number of times that there is no obligation for the State to incorporate the Convention into the national law, and that the Court will not investigate the compliance of the national legislation in abstracto. In the case of James and others v. United Kingdom, the Court stressed that in the general sense the Convention did not bind the contracting States to ensure effective implementation of any provision from the Convention.² Although there is no obligation to incorporate the Convention into domestic law, by virtue of Article 1 of the Convention the substance of the rights and freedoms set forth must be secured under the domestic legal order, in some form or another, to everyone within the jurisdiction of the Contracting States (see the Ireland v. the United Kingdom Judgment of 18 January 1978, Series A no. 25, p. 91, para. 239). This means that the method of implementation of commitments under international law is left to discretionary decisions.

² See James and others v. the United Kingdom, 21 February 1986, Series A no. 98.
of every individual State, provided that such commitments are effectively fulfilled. The Court went further by refusing to resolve the apparent conflict between the domestic law and Armenia’s international commitment. In this case the applicant was convicted for refusing to serve in the armed forces because of his religious beliefs. As it was mentioned in the only dissenting opinion to this judgment, the international commitments Armenia took on in 2000, upon joining the Council of Europe could not be considered as legally binding at the time. Armenia committed itself to recognise that right and to pardon all convicted conscientious objectors not immediately but within three years of accession and had performed its commitments within three years of accession as promised. In that period the Alternative Service Act was adopted, thirty-eight conscientious objectors were pardoned, and the applicant himself was released on parole.

In any case the Court found that those developments had no impact on the applicant’s case.

Because there are no internal mechanisms to accurately define its status in the national law, every State has chosen its own way to incorporate the European Convention.

When considering the manner in which an international instrument such as the European Convention on Human Rights (ECHR) is appealed by domestic courts in individual states, an understanding of the particular constitutional conditions is first necessary. As a rule, the Constitution of a State contains provisions on the status of international contracts in the national legal system, but does not explicitly define the status of the European Convention.

In this respect Armenia supports the monist approach, which means that international law and domestic law are part of the same system of law. Like many other constitutions, the Constitution of the Republic of Armenia (2005) does not explicitly mention the status of the European Convention. Rather, the position of this Convention is based on the status of international treaties in general. According to Article 6 of the Armenian Constitution, international treaties are a constituent part of the national legal system. If a ratified international treaty stipulates norms other than those stipulated in the laws, the norms of the treaty prevail. By virtue of

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3 See Swedish Engine Drivers’ Union v. Sweden, 6 February 1976, para. 50, Series A no. 20; James and others v. the United Kingdom, 21 February 1986, para. 84, Series A no. 98; Observer and Guardian v. the United Kingdom, 26 November 1991, para. 76, Series A no. 216.
4 See Bayatyan v. Armenia, no. 23459/03 [GC], para. 115, ECHR 2011.
Article 6, the supremacy of Armenia’s international obligations in the field of human rights over domestic law is clear. This constitutional principle has a great influence on the direct effect of the European Convention on the Armenian legal system.

2. Historical aspects of accession to the ECHR

Prior to the ratification of the European Convention and its Protocols, the Constitutional Court of Armenia determined the compliance of the commitments stipulated therein with the Constitution and found them to be in conformity with the Constitution.

The role of the Convention within the legal system of Armenia was directly mentioned by the Constitutional Court. In its decision on the question of conformity of obligations stated in the European Convention with the Constitution of the Republic of Armenia, the Constitutional Court particularly noted: ‘The Convention for Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950, essentially differs from other universal and regional international treaties and agreements signed by the Republic of Armenia, by that a special international control system, in the name of the European Court of Human Rights and the Committee of Ministers of the Council of Europe, is acting to guarantee the protection of human rights and fundamental freedoms set forth by the Convention and the Protocols thereto.’ In the same decision, the Constitutional Court observed that, although some rights and freedoms in the Convention and Protocols were not directly stated in the Constitution, they did not contradict the spirit of the Constitution. In particular, it stated that the Armenian constitution did not provide any person or nongovernmental organization with a right to apply to an International Court for protection of allegedly infringed rights, as provided under Article 34 of the Convention. After the Constitutional reform of 2005 this right was included in the text of the Constitution Article 18, which states

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that everyone shall in conformity with the international treaties of the Republic of Armenia be entitled to apply to the international institutions protecting human rights and freedoms with a request to protect his or her rights and freedoms.

In its decision of 17 September 2004 on a review of the conformity with the Armenian Constitution of the obligations stated in Protocol No. 14 to the Convention, the Constitutional Court stated that Armenia assumed the obligation to recognize the new institutional structure of the Court and to provide all conditions necessary for the execution of the effective consideration of cases by the ECHR. By the same decision the obligation of the State to execute the final judgments of the European Court concerning cases to which Armenia is a party was also confirmed.

3. The European Court’s case law in relation to Armenia

3.1. Overview

Since now there have been forty-six judgments adopted in respect of Armenia. Most of these judgments concern violations of the right to liberty and security (20) and to the right to a fair trial (16).

The interaction between the case law of the European Court and the legislation of a State party to the Convention is to be observed under the principle of reciprocity. On the one hand, it is common that the case law has its direct impact on the development of the national law of a certain state. On the other hand, the European Court develops its case law as a result of the examination of a certain appeal lodged against a member State. This general approach refers also to Armenian cases.

We selected the following judgments against Armenia to demonstrate the development and modification of the Court’s existing case laws and their impact on further improvement of the national law and practice. The ones worth mentioning are Bayatyan v. Armenia [GC], no. 23459/03, para. 98, ECHR 2011; Harutyunyan v. Armenia (no. 36549/03, 28 June 2007); Paykar and Haghtanak v. Armenia, no. 21638/03; and finally Poghosyan and Baghdasaryan v. Armenia, no. 22999/06.

3.2. Selected examples

The ruling from the Grand Chamber in the case of Bayatyan v. Armenia overturns the well-established case law, in particular, a precedent-setting ruling of the Court’s Third Section of 27 October 2009. The ruling
abolished the former European Commission of Human Rights' approach according to which the original intention of the States not to include an explicit right to conscientious objection in the drafting of the Convention prevented its jurisprudential creation by the Court.

The Court based its new approach on the doctrines of 'practical and effective rights' (para. 98) and of the 'Convention seen as a living instrument' (para. 102), according to which 'the Convention is interpreted and applied in a manner which renders rights practical and effective, not theoretical and illusory' and 'in the light of the present-day conditions and of the ideas prevailing in democratic States today', taking into consideration 'the changing conditions in the member States and the emerging consensus as to the standards to be achieved'.

In this case the applicant, a Jehovah's Witness who had been declared fit for military service, informed the authorities that he refused to serve in the military on conscientious grounds but was ready to carry out alternative civil service. When summoned to commence his military service he failed to report for duty and was subsequently charged with draft evasion. At the material time in Armenia there was no law offering alternative civil service for conscientious objectors.

This was the first case in which the Court examined the issue of the applicability of Article 9 to conscientious objectors. Previously, the European Commission of Human Rights had in a series of decisions refused to apply that provision to such persons, on the grounds that, because Article 4 para. 3 (b) of the Convention excluded from the notion of forced labour 'any service of a military character or, in cases of conscientious objectors, in countries where they are recognised, service exacted instead of compulsory military service', the choice whether or not to recognise conscientious objectors had been left to the Contracting Parties.\(^6\)

The question was therefore excluded from the scope of Article 9, which could not be read as guaranteeing freedom from prosecution for refusing to serve in the army. However, that interpretation of Article 9 was a reflection of ideas that prevailed at that time. Since then, important developments had taken place both of international level and in the domestic legal systems of the Council of Europe Member States. By the time of the alleged interference with the applicant's Article 9 rights in 2002–3, there

was virtually a consensus among the Member States, the overwhelming majority of which had already recognised the right to conscientious objection. After the applicant’s release from prison, Armenia had recognised that right also. In the light of the foregoing and of its ‘living instrument’ doctrine, the Court concluded that a shift in the interpretation of Article 9 was necessary and foreseeable and that that provision could no longer be interpreted in conjunction with Article 4 para. 3 (b). In any event, it transpired from the *travaux préparatoires* on Article 4 that the sole purpose of subparagraph 3 (b) was to provide further elucidation of the notion ‘forced or compulsory labour’, which neither recognised nor excluded a right to conscientious objection. It should therefore not have a delimiting effect on the rights guaranteed by Article 9.

Accordingly, although Article 9 did not explicitly refer to a right to conscientious objection, the Court considered that opposition to military service motivated by a serious and insurmountable conflict between the obligation to serve in the army and an individual’s conscience or deeply and genuinely held religious or other beliefs constituted a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9. This being the situation of the applicant, Article 9 was applicable to his case.

The applicant’s failure to report for military service had been a manifestation of his religious beliefs and his conviction therefore amounted to an interference with his freedom to manifest his religion. Leaving open the questions whether the interference had been prescribed by law or whether it pursued a legitimate aim, the Court went on to examine the margin of appreciation afforded to the respondent State in the applicant’s case. Given that almost all Council of Europe Member States had introduced alternatives to military service, any State that had not done so enjoyed only a limited margin of appreciation and had to demonstrate that any interference corresponded to a ‘pressing social need’. At the material time, however, the existing system in Armenia imposed on citizens an obligation that had potentially serious implications for conscientious objectors while failing to allow any conscience-based exceptions and penalizing those who, like the applicant, refused to perform military service. Such a system therefore failed to strike a fair balance between the interests of society as a whole and those of the individual. In the Court’s view, the imposition of a criminal sanction on the applicant, where no allowances were made for the exigencies of his religious beliefs, could not be considered a measure necessary in a democratic society. The Court further observed that the applicant’s prosecution and conviction
had occurred after the Armenian authorities had officially pledged, upon
acceding to the Council of Europe, to introduce alternative service within
a specific period and they had done so less than a year after the applicant's
conviction. In these circumstances, the applicant's conviction, which had
been in direct conflict with the official policy of reform and legislative
changes in pursuance of Armenia's international commitment, could not
be said to have been prompted by a pressing social need. This approach
was followed in a number of cases against Turkey.7

A violation of Article 6 was found in the case of Harutyunyan
v. Armenia. In this case the applicant had been coerced into making con-
fession statements and the two witnesses had been coerced into mak-
ing statements substantiating his guilt. The statements obtained under
duress had been used as evidence, despite the fact that ill – treatment had
already been established in parallel proceedings against the police officers
involved. The domestic courts had justified the use of these statements by
the fact that the applicant had confessed to the investigator and not to the
police officers in question and by the fact that both witnesses had made
similar statements later, at the confrontation and at the court hearing.
The European Court, however, was not convinced by such justification.
Where there was compelling evidence that a person had been subjected
to ill-treatment, including physical violence and threats, the fact that
this person had confessed – or confirmed a coerced confession in his
later statements – to an authority other than the one responsible for this
ill-treatment should not automatically lead to the conclusion that such
confession or later statements had not been made as a consequence of the
ill-treatment and the fear that a person might experience thereafter. There
had been ample evidence before the domestic courts that the witnesses
had been subjected to continued threats of further torture and retaliation.
Furthermore, the fact that they had still been performing military service
could undoubtedly have added to their fear and affected their statements,
which was confirmed by the fact that the nature of those statements had
essentially changed after demobilization. Hence, the credibility of the
statements made by them during that period should have been seriously
questioned, and these statements should certainly not have been relied
upon. Regardless of the impact the statements obtained under torture
had on the outcome of the applicant's trial, the use of such evidence had
rendered the trial as a whole unfair.

7 See Feti Demirtas v. Turkey, no. 5260/07, 17 January 2012; Ercep v. Turkey, no. 43965/04,
30 November 2011.
In the case of *Poghosyan and Bagdasaryan v. Armenia* the first applicant was found guilty of murder and rape and sentenced to fifteen years' imprisonment. However, he continued to claim his innocence. Subsequently his conviction was quashed and he was released from prison. Two of the police officers who had dealt with the initial investigation into the murder were subsequently convicted for exceeding their powers after a regional court found that they had ill-treated the first applicant in order to extract a confession. In separate civil proceedings, the first applicant was awarded compensation in respect of lost earnings, but his claim in respect of nonpecuniary damage was dismissed on the grounds that damage of that type was not envisaged by the Civil Code.

The applicant raised complaints under Articles 3 and 13 of the Convention and Article 3 of Protocol No. 7. In its judgment the Court stated that the existence of an actual breach of another provision of the Convention was not a prerequisite for the application of Article 13. All that was required for that provision to apply was an arguable claim in terms of the Convention. The first applicant had undoubtedly had such a claim as the domestic courts had unequivocally established that he had been ill-treated by the police. Article 13 was therefore applicable despite the fact the Court could not examine the first applicant's substantive complaint under Article 3 because his ill-treatment had occurred before the Convention entered into force in respect of Armenia. The Court had found in previous cases that compensation in respect of nonpecuniary damage should in principle be available as part of the range of possible remedies for violations of Articles 2 and 3, the most fundamental provisions of the Convention. Because no such compensation had been available to the first applicant under the domestic law, he had been deprived of an effective remedy.

Inasmuch as the first applicant's conviction had been quashed and he had applied for compensation after the date Protocol No. 7 entered into force in respect of Armenia, the Court found that it had temporal jurisdiction in respect of this complaint and Article 3 of Protocol No. 7 was applicable. While that provision guarantees the payment of compensation according to the law or the practice of the State concerned, compensation was due even where the domestic law or practice made no provision for such compensation. For the first time the Court stated that the purpose of Article 3 of Protocol No. 7 was not merely to recover any pecuniary loss caused by wrongful conviction but also to provide a person convicted as a result of a miscarriage of justice with compensation for any nonpecuniary damage such as distress, anxiety, inconvenience, and loss of enjoyment of life.
4. The effects of the Court’s case law at a national level

4.1. Judiciary

It is necessary to focus on two issues when trying to assess the current process of the implementation of the Court’s case law with the national legal order of Armenia. First, the guidance provided by the highest judicial instances to lower courts on the implementation of the requirements of the ECHR. Second, the ongoing developments of the legislation aimed at putting it in line with the case law of the ECHR. In other words, with respect to the methods that could be utilized to implement the ECHR judgments there appear to be two viable options: judicial implementation and a legislative process.

The judicial implementation of the Convention directly depends on the position of the highest judicial instances in domestic legal order.

4.1.1. Constitutional Court

Having in mind the role of the Constitutional Court as ‘protector of human rights and freedoms’ it is particularly interesting to observe whether and how much the Constitutional Court implements the European Convention.

The Constitutional Court may apply the Convention and the resolutions and legal positions of the ECtHR in two ways: through direct interpretation of the applicable provision of the Convention and through the acceptance of the interpretation of certain principles in the way in which they have been interpreted in the practice of the ECtHR.

Upon receiving a constitutional appeal, the Constitutional Court refers to the practice of the ECtHR in a number of its decisions. The practice of the ECtHR has been used by the Constitutional Court in certain decisions in which it exercised its real normative control, to interpret certain provisions of the Convention, that is, in the way in which those provisions have been interpreted by the ECtHR. In deciding the constitutionality of the provisions regulating the return of the criminal case for an additional investigation, having in mind the practice of the ECtHR, the Constitutional Court gave the following interpretation of the ‘equality of arms’: ‘the principle of equality of arms implies that each party must be afforded a reasonable opportunity to present his or her case – including evidence – under

* See Decision of the Constitutional Court, DCC-787, 3 February 2009, para. 8.
conditions that do not place him/her at a substantial disadvantage, \textit{vis-à-vis}, his or her opponent."\footnote{See Decision of the Constitutional Court, DCC-710, 24 July 2007.}

In its decision of 15 July 2011 on the conformity of the provisions regulating the reopening of criminal and civil cases with the Constitution of Armenia, the Constitutional Court of the Republic of Armenia stated that, in the case of existence of new circumstances, when there is an objective necessity for implementation of the rights, the initiation of ‘the proceedings in review’ and the process of judgment review by the competent court is a legal necessity, the court’s constitutional obligation, that has the aim to restore the violated constitutional rights of the person. This position of the Constitutional Court was based on the judgment of the ECHR in the case of \textit{Papamichalopoulos and others v. Greece}, according to which ‘a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach.’

Based on the preceding, the Constitutional Court found that the judgment review, following the decision of the Constitutional Court, shall \textit{ipso facto} lead to vacation of the judgment that had been based on the unconstitutional provision.

Based on the judgment in the case of \textit{Xheraj v. Albania}, the Constitutional Court stated that the judgment review due to new circumstances is an exceptional case, when the assurance of the protection of human rights and effective implementation of the decisions of the Constitutional Court and the ECTHR prevail over the principles upon which the doctrine of \textit{res judicata} was based, in particular, over the principle of legal certainty.

In its decision of 15 November 2011 the Constitutional Court, relying on the case law of the Court, has drawn a distinction between facts and value judgments. The Constitutional Court stated, in particular, that the judicial discretion especially in defamation cases, when the subject matter under review is the restriction of the right of freedom of expression guaranteed by Article 27 of the Armenian Constitution, should be guided not only by the requirement to apply the provisions of the law according to the interpretation based on their constitutional-legal content, but also by the international practice and by the case law of the European Court.

Judgment of 20 May 1999, Lingens v. Austria, Judgment of 8 July 1986, Busuioc v. Moldova, Judgment of 21 December 2004, the Constitutional Court envisaged the principles applicable by the national courts in interpreting provisions relating to the interpretation of the freedom of expression.\(^{10}\)

4.1.2. Court of Cassation

On the basis of the constitutional amendments (2005) special legislative provisions were adopted in order to ensure the implementation of the Court’s case law in the national legal order. Namely a new Judicial Code was adopted on 21 February 2007 (entered into force on 18 May 2007), Article 15 of which states in particular that the reasoning of a judicial act of the ECtHR in a case with certain factual circumstances is binding on a court in the examination of a case with identical/similar factual circumstances, unless the latter court, by indicating solid arguments, justifies that such reasoning is not applicable to the factual circumstances at hand. All these changes introduced into the Armenian legislation were aimed at facilitating the implementation of the Convention by the national courts and demonstrating the leading role of the Court of Cassation in that process.

There can hardly be any sustainable improvement without an effective guidance by the Court of Cassation to the lower courts as to the implementation of the Convention. Such guidance may be effective when the Court of Cassation refers to the Convention in its decisions. In this respect, the Court of Cassation’s decision in the SalARCORCYAN case is worth mentioning. In this case the applicant was accused of committing an administrative violation and finally subjected to detention of five days without being provided with procedural guarantees. Relying on the well-established case law of the Court (Öztürk v. Turkey, Bendenoun v. France), the Court of Cassation found that the offence of which the applicant had been accused could be classified as ‘criminal’ for the purposes of the Convention and subsequently Article 6 was applicable.

The recent case law of the Court of Cassation can offer striking examples of how the supreme judicial instance in Armenia can influence the implementation process, both in a positive or a negative sense.

In its decision of 28 November 2008 in the case of GHzALYAN the Court of Cassation found the interpretation of Article 381 para. 2 given by the lower courts to contradict the requirements of Article 5 para. 3 of

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\(^{10}\) See Decision of the Constitutional Court, DCC-997, 15 November 2011.
the Convention.\footnote{According to Article 381 para. 2, the Court of Appeal shall leave an appeal unexamined if it does not comply with the requirements set out in this Article, was lodged by a person who was not entitled to do so, or was lodged out of time.} It found, in particular, unacceptable the limitation of the right to appeal against decisions imposing detention or prolonging a detention period depending whether the appeal was lodged within the scope of judicial control over pretrial proceedings or during the court proceedings of the case.

In its decision of 26 December 2008 the Court of Cassation found that Article 285 para. 2 of the Code of Criminal Procedure (CCP),\footnote{Article 285 para. 2 of CCP allowed imposition of a preventive measure depriving a person of liberty in the absence of that person, without providing a possibility for the person discovered as a result of the search to appear before the court and for the question of his detention to be discussed in his presence.} as regards imposition of a preventive measure on an accused in whose respect a search had been initiated, was incompatible with the requirement of Article 5 para. 3 of the Convention that the arrested person be promptly brought before a judge. The Court of Cassation found that such rules of criminal procedure law would breach Article 5 para. 3 of the Convention and would constitute a grave violation of a person's right to liberty if a person discovered as a result of the search was not brought promptly before a court. According to the Court of Cassation, a necessary domestic safeguard for the protection of the right to liberty must be an additional examination by the relevant court of the question of detention in the presence of the affected person following his discovery as a result of the search.

In its decision in the case of \textit{Minasyan} dated 10 April 2009 the Court of Cassation, taking into account the findings reached in the judgment of the ECHR in the case \textit{Jėčius v. Lithuania},\footnote{\textit{Jėčius v. Lithuania}, no. 34578/97, ECHR 2000-IX.} the Court of Cassation found that the suspension of the detention period on the ground that the case had been transmitted by the prosecutor to a court (Article 138 para. 3)\footnote{According to Article 138 para. 3, during the pretrial proceedings of a criminal case the detention period may not exceed two months, except for cases prescribed by this code. During the pretrial proceedings of the criminal case the running of the detention period shall be suspended on the date when the prosecutor transmits the criminal case to the court or when detention is cancelled as a preventive measure.} constituted an unlawful limitation of a person's right to liberty and therefore contradicted to Article 5 para. 1 of the Convention. The Court of Cassation found that in cases when the detention period less than the time limit left to a judge to adopt one of the decisions envisaged by Article 292 of the CCP, the investigating authority, when transmitting the case to the
court, must also resolve the question of the person's detention, namely release him if the grounds justifying his detention had ceased to exist or file a motion with the court seeking a prolongation of the detention period if there were relevant grounds. Later the European Court found the same situation to be a violation in several cases against Armenia lodged before the mentioned decision of the Court of Cassation was adopted (Piruzyan v. Armenia, no. 33376/07, ECHR 2012 (extracts); Poghosyan v. Armenia, no. 44068/07, 20 December 2011; Sefilyan v. Armenia, no. 22491/08, 2 October 2012).

Another vivid example how the Court's case law was implemented by the Court of Cassation is the case of Taron Hakobyan. In this case the Court of Cassation, relying on the well-established case law of the European Court, interpreted the Armenian legislation concerning alternative preventive measures. At the domestic level, legislation does not sanction the imposition of pretrial detention based solely on the gravity of charges. Article 135 of the CCP does not list the gravity of the alleged crime among grounds that could justify the imposition of remand measures. The gravity of the alleged crime is a factor that, together with other factors listed in the same provision, is to be taken into account when making a decision to place a person in detention on remand. Although contrary to international standards the CCP limits substitution of pretrial detention with monetary bail only to petty crimes and crimes of considerable gravity. The Court of Cassation, referring to the case law of the ECtHR (Caballero v. UK, SBC v. the UK), has held that monetary bail shall be considered regardless of the severity of the charges, because, according to Article 6(4) of the Armenian Constitution, ratified international treaties supersede domestic laws and if the latter contradict treaties, the treaty should be applied. The Court of Cassation also held that despite being an essential factor for assessing the future conduct of the defendant, the gravity of charges should be evaluated within the complex of other factors specified in Article 135 of CCP.

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17 See Cabalero v. the UK, application No. 32819/96, 8 February 2000.
18 See Case of Taron Hakobyan, Court of Cassation, no. VB-115/07, 13 July 2007, para. 3.1.
19 See Case of Aslan Avetisyan, Court of Cassation of the RA, AVD/0022/06/08, 2008, para. 26.
In relation to the issue of substantiation of judicial decisions, Article 136(1) of the CCP provides that decisions on the application of remand measures should be reasoned; they should include a description of the alleged crime and substantiation of necessity to apply the particular remand measure. Furthermore, Article 358 states that the court's final judgments should be lawful, substantiated, and reasoned. As further interpreted by the Court of Cassation, the requirements of the mentioned article are applicable not only to final judgments, but also to pretrial detention decisions and all other decisions issued by courts while executing judicial oversight at the pretrial stage. The court went further to detail that a judicial decision is lawful if based on current legislation, substantiated if the findings of the court are based on evidence that has been explored during court hearings, and reasoned if the court could present all argumentation that supported conclusions and made reference to laws which support final findings. Moreover, the Court of Cassation expressed its position regarding the requirements of judicial decisions specifically in relation to the issue of grounds supporting authorization of pretrial detention. In the case of Aram Chuguryan the Court of Cassation stated that the grounds for the authorization of pretrial detention, listed in the CCP, relate to something that can happen in the future. However, these assumptions should be realistic and based on materials of a particular case. This means that these decisions should be based on facts.

The preceding examples illustrate that the Court of Cassation, proceeding by analogy, is taking pointers from the Court's general case law in developing its own case law. First, when it finds it necessary, it interprets the domestic law along the lines already drawn in the case law of the European Court. Second, it reexamines the cases in which a violation of the Convention has been found by the European Court.

The possibility provided by the Armenian legislation for reopening of the cases on the basis of the finding made by the European Court is of crucial importance. There is no doubt that the enforcement of an ECHR judgment is mandatory for the State concerned. In other words, the consent of the state to the competence of the ECHR also implies the consent to the enforcement of its decisions.

The reexamination of the cases finally decided at domestic level is sometimes the only way of properly remedying the violation indicated by the

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European Court. Like many Council of Europe Member States, Armenia provides this possibility not only for criminal proceedings but also for civil and administrative proceedings. To this end amendments were made in the domestic legislation in order to provide a possibility for examination pursuant to a final judgment by the European Court concerning violation of basic human rights. In this respect Article 426.4 of the CCP, amended on 28 November 2007, recognizes the judgment of the European Court as a new circumstance for reopening of the case. The similar amendments were made in the Civil Code of Procedure. So, the judgment of the European Court might be considered as a new circumstance vis-à-vis the res judicata rule. The judicial act of the court of first instance shall be reviewed by the Court of Cassation based on new circumstances, whereas the judicial acts of the Courts of Appeals and the Cassation Courts shall be reviewed by the Court of Cassation, based on the claim. The following persons shall be entitled to appeal for the review of judicial acts based on new circumstances:

(1) Participants of court proceedings, except for criminal prosecution bodies;

(2) Prosecutor General of the Republic of Armenia and his or her Deputies.

An application to review a case on the basis of new or newly discovered circumstances must be lodged within three months of the time when the appellant knew or could have known about their existence. Throughout the reexamination, the domestic court is bound by the legal opinion set forth in the European Court's final judgment. All these provisions make it possible to review and reopen proceedings in cases in which the European Court finds that the Convention was violated and places special emphasis on the obligation of contracting parties to abide by the final judgment of the ECtHR on any case to which they are a party.

As it was mentioned, the second method that could be utilized to implement the ECHR judgments (case law) is the legislative process.

As part of the reform of the judicial system, many legislative acts have been amended. These amendments were prompted by the necessity to implement the principles and guarantees enshrined in the Convention.

In the case of Mkrtychyan v. Armenia, which is the first judgment against Armenia, the applicant had been subjected to fine for a violation of the existing rules on organizing and holding rallies and street processions. It was in dispute between the parties whether at the material time there had been any legal act in Armenia that envisaged rules regulating the right to freedom of assembly. The government alleged that the former USSR
laws are applicable, while the applicant contended that those acts were no longer valid and applicable in Armenia following its independence. The Court eventually concluded that, at the relevant time, there had been no legal act applicable in Armenia that contained those rules.

Following the communication of this case to the respondent government, a new law on conducting rallies, meetings, and demonstrations was adopted by the Armenian Parliament 28 April 2004. The objective of the law was to create the necessary conditions for people to exercise their right to conduct peaceful, unarmed meetings, assemblies, rallies, and demonstrations set forth in the Constitution and international treaties, and to prohibit any restrictions in exercising of this right other than those set out in Article 11 of the Convention. This is a clear and vivid example of the developmental impact of the Court's case law on Armenian legislation.

The case of Paykar Yev Haghtanak against Armenia (application No. 21638/03), concerns the violation of the applicant's right of access to court in that the Court of Cassation refused in 2003 to grant the applicant company's request for deferral of payment of court fees, with the result that the company’s cassation appeal against an earlier court decision upholding the imposition of certain tax fines was not examined (violation of Article 6 para.1).

The European Court noted that the Court of Cassation had been prevented from making any assessment of the applicant company’s ability to pay court fees by the express provisions of Article 70 para. 3 of the Code of Civil Procedure, which flatly prohibited exemption of commercial entities from payment of court fees. The Court considered that such a blanket prohibition raised of itself an issue under Article 6 para. 1 of the Convention.

On 7 April 2009, Article 70 para. 3 of the Code of Civil Procedure, which excluded commercial entities from the right of deferral of payment of court fees (and that was thus the basis of the preceding violation), was abolished (Amendment HO-85-N). Simultaneously, Article 22 para. 4 of the Law on State Fees was abolished, as it had the same wording as Article 70 para. 3 of the Code of Civil Procedure (Amendment HO-85-N).

Following these reforms, nothing will prevent the domestic courts from making their own assessment of companies' ability to pay court fees in the light of the requirements of the Convention as regards access to court.

4.2. Legislative level

In view of the comprehensive review of more than ten years of operation of the existing CCP, bearing in mind the importance of implementation
of the principles established by the Court into the national legislation and having regard to the nature of the violations found by the Court, the Armenian authorities have now drafted a conceptually new CCP. The new code is to reflect the latest developments in the case law of the ECtHR and to remove the legal provisions that are either clearly incompatible with the requirements of the Convention or too easily construed and applied so as to breach those requirements. Most of the violations found by the European Court concern the right to liberty and security under Article 5, including detention without authorization by the court, the prosecution’s reliance on legal grounds without any substantiated reasoning for the use of lengthy detention, the failure of the courts to advance relevant and sufficient grounds for the use of detention on remand, and the failure to consider alternative and less restrictive preventive measures. Insufficient clarity has been found in the scope of powers concerning surveillance measures and the conditions governing their use, contrary to Article 8 of the European Convention. In this respect a lack of appropriate safeguards has been found.

The new code gives effect to many of the requirements of the European Convention, as elaborated in the case law of the Court. It incorporates a set of elements supporting the presumption in favour of liberty, including the need to specify the circumstances suggestive of reasonable suspicion and the relevant prevailing risks that would justify a lengthy detention.

The new code, as compared to the existing one, provides greater clarity and precision in its legal provisions, and the procedural status and the rights and prerogatives of various participants in criminal proceedings are prescribed through specific and detailed regulations. This is undoubtedly a positive development, as the clarity and precision of legislation (namely criminal legislation) are qualitative requirements of the Court’s case law and, as it has been shown by the Court in its judgments against Armenia, some provisions of the existing legislation leave much to be desired.

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22 The analysis of the latest judgments against Armenia reveals that a number of violations were directly conditioned by the existing regulations of the CCP.

23 See Piruzyan v. Armenia, no. 33376/07, paras. 75–82, ECHR 2012 (extracts); Muradkhanyan v. Armenia, no. 12895/06, 5 June 2012, paras. 58–73.

24 See Piruzyan, paras. 89–100, ECHR 2012 (extracts).


27 See Sefilyan v. Armenia, no. 22491/08, 2 October 2012, para. 75; Grigoryan v. Armenia, no. 3627/06, 10 July 2012, para. 85; Piruzyan v. Armenia, no. 33376/07, para. 80, ECHR 2012 (extracts).
The Draft Code also proposes a series of commendable amendments as to the strengthening of adversarial proceedings; ensuring equality of arms; expanding the rights of the defence; ensuring a better separation of procedural functions between the investigator and prosecutor; strengthening the role of the court in all stages of criminal proceedings; and enhancing judicial review of pretrial proceedings. Most of these amendments are aimed at the implementation of the latest findings of the European Court in the national legislation.

5. Conclusions

In view of these developments the current situation presents a variety of challenges to the human rights protection system in Armenia and the commitment of the national authorities to overcome them.