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HIERARCHY OF THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS: A BRIEF DISCUSSION OF THE COURT'S CASE-LAW HIERARCHY, ITS SOURCES AND LEGAL IMPORTANCE

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There is nothing like looking, if you want to find something.
You certainly usually find something, if you look,
but it is not always quite the something you were after.
J.R.R. Tolkien

Quite contrary to what J.R.R. Tolkien is saying, and most probably in relation to a different subject, research into the European Court's case-law can indeed bring fruitful results and can indeed bring you to the point where you can find something you are looking for. In order to achieve this one needs to establish clearly the object of research, limiting the case-law search to those elements that are relevant for the task being performed by the researcher. Moreover, even knowing the object of research, one should also establish the steps to be taken for it. In particular, the usual questions for a person exploring the Court's case-law anew or wishing to explore cases and jurisprudence of the Court in greater detail are "what do I start with?" and "how do I approach the case-law of the Court?" This column will attempt to answer these queries. It will attempt to respond to these uneasy questions and to provide brief theoretical and practical guidance on how to approach the Court's case-law. It will give some explanations as to doctrinal views on the "weight" each piece of the Court's jurisprudence has. Thus, the article will speak about the Court's case-law hierarchy from a purely theoretical point of view, bearing in mind the practical considerations in applying the Court's case-law.

Case-law of the European Court of Human Rights is a complex matter. Its theoretical foundations are not easy to grasp. Language difficulties, common law and continental law tradition elements in it, unique interpretation of the case-law by the Court itself are only some uneasy challenges for a motivated researcher into the subject. Notwithstanding the difficulty of a theoretical doctrinal research into the Court's case-law such a study is undoubtedly of importance for any European law theorist, human rights academician or a legal practitioner. European Human Rights Law as a legal discipline offers a range of research

subjects ensuing from the doctrine and theory of European Human Rights Law. Nevertheless, unfortunately, there are really few studies that indeed offer a comprehensive "European Court of Human Rights case-law" theory or provide for a complete doctrinal step-by-step review of the Court's jurisprudence. Most of the studies take doctrine for granted, being limited mostly to practical aspects of specific case-law application or offering topic-oriented or Article-oriented research and thus usually cover only certain specific elements of the Court's case-law. There are several reasons for such limitations. One of them, which is probably the most important one, is that lawyers addressing the jurisprudential practice of the European Court of Human Rights most often speak about the judgments delivered by it in which the Court establishes a breach of particular provisions of the Convention and not about the remaining significant body of the Court's jurisprudence, where such breaches are not established. This probably also ensues from the how the cases pending before the Court are being argued – the applicant or a lawyer attempts to prove that there has been a breach of a particular provision of the Convention in his or her case.

It is quite apparent that the Court does not find a violation of the Convention provisions in every single judgment delivered by it; neither does every single application examined by the Court reach the stage of the judgment on the merits. Therefore cases of broader legal interest would not necessarily be relating to judgments finding a violation of the Convention only. They would also relate to matters, which frequently fall outside the wide public coverage, and relate to, *inter alia*, the findings of no breach of the Convention or decisions declaring a particular application or complaints under the Convention inadmissible. Thus, legal practitioners, academics and general public interested in the jurisprudence of the Court have much more than just the "violation judgments", i.e. not only the judgments of wider public interest to explore in their research.

The judgments finding a breach of the Convention are also cited most often as in many instances they address issues of importance for European human rights protection system and the system of human rights protection existing within the State. These judgments indeed attract a lot of media and public attention and not without reason. They are of high legal quality, examine topical for European and domestic human rights protection system issues and possess a number of elements of legal, media and public interest. However, they are not all the Court offers to a dedicated Court's case-law researcher. The judgments in which the Court finds no breach of the Convention, the Court's admissibility decisions and the old Commission's case-law largely remain outside the focus of discussions on the Court's jurisprudence. There are clear explanations to that as well. One of them is them is that the judgment finding a breach of the Convention underlines the applicant's success in a dispute with a State, thus being more attractive to wide public circles. It also establishes State's failure to ensure effective operation of the human rights protection regime domestically and therefore require some sort of follow up action on the part of the State. On the other hand a judgment finding no breach of the Convention or

declaring the case inadmissible re-confirms the existing *status quo* in the area of domestic human rights protection. Such a judgment strengthens the important subsidiary role of the European Court of Human Rights with respect to the system of domestic protection and does not require any action on the part of the State, raising no discussions and having no specific practical implications for domestic human rights protection. Furthermore, these judgments or decisions are important examples of practice of the Court, which should be taken into account and should not be disregarded by those applying to the Court, i.e. those who wish to avoid similar shortcomings in the applications lodged, thus ensuring compliance of applications with substantive and procedural admissibility rules and thereby ensuring the applications' review on their merits.

To start with, the case-law of the European Court of Human Rights is a very general notion, which comprises a number of elements, some of which are frequently overlooked by researches into the subject for the reasons discussed above. As such the notion of "case-law" includes not only judgments, but also decisions of the Court. Both decisions and judgments can be given on issues relating to merits of complaints under the Court's review. They also involve decisions and judgments relating to matters of procedure or particular elements of procedure requiring Court's specific attention.[1] Matters of procedure are also dealt with by various compositions of the Court, by its collegiate bodies or unilaterally.[2] Whereas the collegiate bodies adopt judgments, some of the decisions are taken unilaterally. In theory, decisions can be taken at various stages of the proceedings. Both judgments and decisions are capable of finalising processing of a particular case. One can also underline the stage, when a particular decision had been taken. Thus, judgments and decisions could be taken at both "pre-admissibility stage" of the proceedings as well as after it, i.e. "post admissibility", even though such a division is very theoretical.[3] Most recently, with the entry into force of the Protocol No. 14 to the Convention, the stage of case communication became more significant from a procedural point of view as a formal step taken with the aim of reviewing the application on the merits. Thus, one might rightly observe that certain decisions, especially those of procedural nature, are being adopted at the pre-communication stage of the proceedings and certain after it. Summing up the above, one might suggest the following listing for judgments and decisions taken by the Court that can be divided into certain types by:

- *their legal content*: those of *procedural nature* (decisions relating to particular procedural claims, interim measures, communication of the case,

[1]. Even though a judgment taken as to the purely procedural matter would be a rarity, one can still arguably claim that some of the judgments deal with important issues of procedure, clarifying such issues in more detail. See, for more details, a Practical Guide on Admissibility Criteria (http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Case-law+analysis/Admissibility+guide/).

[2]. Largely speaking, as such, matters of procedure are usually addressed by the Plenary of the Court and reflected in the Rules of the Court. Some issues of procedure are also appearing in the decisions taken by the President of the Court in the form of practice recommendations.

[3]. Several judgments can be adopted in one case. For instancee, a judgment can be adopted by the chamber of seven judges, seven judges can also adopt Article 41 judgment and a judgment can be also given by the seventeen-judge composition of the Grand Chamber.

declaring the case admissible, etc.) or *substantive nature* (decisions on the merits of cases, inadmissibility decisions, judgments on the merits, etc.);

- *their legal importance, weight or legal value (from highest to lowest)*: the Grand Chamber judgments and decisions, the chamber judgments and decisions, as well as the Commission's case-law and eventually committee decisions and judgments (following up on previous case-law) and decisions taken by a single judge;
- *a decision-making body or type of formation:* decisions taken by *collegiate bodies* (judgments given by a committee, a chamber or a Grand Chamber) and *unilateral decisions* (decisions taken by a single judge, judge rapporteur or the President of a particular chamber, etc.);
- *their legal nature:* those adopted by various judicial formations and those delegated to the Registry of the Court, i.e. judicial, quasi-judicial or non-judicial decisions (for instance procedural decision to propose friendly settlement to the parties, etc.)*;*
- *the stage of the procedure*: *pre-admissibility decisions* (various procedural decisions in preparation of the case for examination) and *post-admissibility decisions* (judgments on the merits, friendly settlement, judgments on just satisfaction, etc.); or alternatively *pre-communication decisions* (decision to request further information, to apply Rule 41 measures, etc.) and *decisions taken after communication of the case to the respondent Government*.

Let's concentrate our attention on the procedural decisions first. These decisions can also be grouped into decisions taken unilaterally (by a judge of the Court, President of the formation or the rapporteur in the case) or collegially (by three, seven and seventeen judges for instance). Examples of such decisions can be listed as follows:

- Decisions taken by the rapporteur in the case or a single judge (refer the case to a particular formation, request additional information/documents, etc.);
- Various procedural decision by a President of the Section / by the Chamber (*inter alia* decision to grant priority (Rule 41), decision to inform the GVT about the case (Rule 40), decision to apply interim measures (Rule 39), decision to grant anonymity, to request additional information from the parties, etc.);
- Decision to communicate the case (communication by the President of the Section / communication by the President of the Chamber);
- Decision of the Court declaring the application admissible or partly admissible / inadmissible (these decisions after entry into force of Protocol No. 14 to the Convention can be taken by three judges and also by the chamber of seven judges; also in the system existing before Protocol No. 14 to the Convention the chamber could adopt a provisional opinion as to whether there had been a breach or no breach of the Convention);
- Decision of the Court striking the application out on the basis of failure of the applicant to manifest their wish to continue further examination of the case, on the basis of conclusion of a friendly settlement between the parties

or on the basis of a unilateral declaration of the Government expressing their desire to settle the case.

As to the decisions and judgments delivered on the merits. One has to underline that these can be adopted by various formations, i.e. by a single judge (decision as to admissibility), committee of three judges (as to admissibility or on the merits by means of a judgment or a decision), chamber of seven judges (as to the merits of the case or as to admissibility by means of a judgment or a decision) and the Grand Chamber of seventeen judges (both judgments or decisions can be adopted by the Grand chamber). The types of decisions taken by these bodies vary and they can, once again, more generally include:

- Decision to strike-out the case from the Court's list of cases (for failure to show wish to continue with the case, for friendly settlement or unilateral declaration);
- Decisions as to admissibility, including inadmissibility decisions, admissibility decisions and decisions declaring the application or complaints partly inadmissible and communicating other elements of the case to the respondent Government;
- Judgments on the merits finding a breach or no breach of the Convention or the Protocols thereto;
- Judgments dealing with Article 41 just satisfaction claims.

Some separate rulings can be also taken with respect to the cases pending before the Court and they might include judgments striking the case out from the Court's list of cases or adopting a judgment under Article 41 of the Convention on just satisfaction to be given to the applicant after a delivery of the judgment on the merits. Under separate procedure the Court might also deliver an advisory opinion on the basis of submissions by the Committee of Ministers for interpretation of the provisions of the Convention. It might also deal with an issue of compliance with the Convention by a particular state, under Article 46 procedure, on the basis of submission by the two thirds of members of the Committee of Ministers of the Council of Europe.[1] Additionally, one can also speak about judgments delivered in inter-State cases, most recent examples of such cases were those in proceedings between Russia and Georgia relating to military conflict events in Abkhazia and South Ossetia.

As to the Court's case-law hierarchy itself, first of all, one has to bear in mind the nature of the Court's jurisprudence that is not considered to be a classical type of precedent, i.e. *stare decisis*[2], but nevertheless it is based on compliance with the principle of legal certainty of its jurisprudence and the inherent rule of law principle and acts in compliance of the "following up" cases with the previous case-law on a similar matter of legal concern.[3] The Court's

[1]. This has not occurred yet, but seems to be a suggested by Protocol No. 14 course of action against non-complying State.

[2]. G. Gulliaume. The Use of Precedent by International Judges and Arbitrators. Journal of International Dispute Settlement, Vol. 2, No. 1 (2011), pp. 5–23.

[3]. "While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases" (see Chapman v. the United Kingdom [GC], no. 27238/95, ECHR 2001-I, paragraph 70.

jurisprudence is often characterised by a degree of reasonable or careful innovation, which is ensuing in the practice of the Court from the doctrine of "living instrument", based on interpretation of the Convention in the light of present day conditions and the need to ensure that the Convention rights are given full effect. Nevertheless, a lot of such innovation takes place with adoption of new case-law or the change of the previous long-standing case-law through judgments and decisions, which are usually adopted by the Grand Chamber of the Court.[1] The change of previous practice might occur at the level of the chamber of seven judges as well. However, it cannot, on the other hand, be effectuated by the judgments and decisions taken by three judges or through decisions taken unilaterally. One has to note that the three judges, under the procedures enshrined in Protocol No. 14, can only deal with matters of well-established case-law of the Court. Such judgments and decisions do not generate case-law, but are only supposed to follow the previously existing case-law. Thus, one can underline the following legal hierarchy or degree of authority, from highest to lowest source of legal authority, in the Court's case-law and as based on judgments and decisions adopted by the collegiate bodies:

- Grand Chamber judgments and decisions;
- Chamber judgments and decisions;
- Committee of three judges judgments and decisions on matters of well-established case-law of the Court, i.e. those dealing with "repetitive cases" (both single judge decisions and decisions and judgments given by three judges are not "generating" case-law, but are supposed to follow the previous Court's case-law on the matter)[2];
- Commission decisions as to admissibility of complaints and with expression of provisional views as to subject-matter of the case (existed before 1 November 1998).

As a matter of general practical approach for researching a particular Convention matter, one might first of all need to establish the provision of the Convention or Protocols thereto involved, then the general rule on interpretation of the Convention or the Protocols as appearing from the Grand Chamber case-law, then rules appearing from the most recent and most relevant chamber judgment on the merits of the case and eventually arising from the Court's admissibility decisions. Finally, if there is no other case-law on the subject delivered by the new Court after 1 November 1998, one should look into the European Commission on Human Rights jurisprudence. In this respect, one should note that the relevant rules of interpretation can be established in the part of the judgment establishing jurisprudential principles applicable to the case (in the judgment's or decision's *ratio decidendi* explaining the rationale or the reasons for the decision taken, that is once again bearing in mind that the Court's judgments are not a classic kind of common law precedent and jurisprudential principles involved in the case do not always remain static). It

[1]. A. Mowbray. An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case Law. HRLR 9 (2009), pp. 179 – 201.

[2]. A phrase often applied in this respect in the judgments and decisions of the Court is "among many other authorities".

should be also noted that communication decisions, which are now being reported in the HUDOC database in the "Communicated cases collection"[1], also might be of interest from the point of view of practical considerations as indeed "communicated cases" are often underlining the problem appearing under the Convention. The same applies to a collection of Resolutions of the Committee of Ministers on various subjects relevant for differing Convention research[2].

Search for relevant case-law is based on legal and factual similarity and conclusions as to such relevance are usually based on similarity of the facts, similarity of the complaints and similarity of legal conclusions thought of. Furthermore, the process of applying case-law might frequently involve analogy, i.e. through a technique of underlying the relevant differences between the case at issue and the cited case-law.[3] Normally, such an approach is used by means of explaining what the underlying difference between the cited case and the case at issue is. Similarly, in certain other cases the Court, in its reasoning of the relevant decision or a judgment given in the case, underlines the difference between a particular case at issue and a case where the Court has decided otherwise. In such cases, the case-law cited might appear to have conclusions as to the contrary or the case at issue might be compared to a different case, where for instance a factual situation had some resemblance, but the legal conclusion was not entirely the same or even entirely opposite to the present one.[4]

One should bear in mind that cases relating to the legal concepts, institutions, legal and judicial system and type of domestic judicial procedure are of relevance for case-law research exercise. In researching for the closest possible relevant case one might take into account, quite naturally, the cases concerning a particular country involved whereas the Court might have already dealt with a similar case against that same country or with involvement of a legal system having certain degree of similarity with the one at stake. Otherwise, main of focus of legal issues research should be aimed at the relevant passages of the "law" section of the Court's judgment. One should also note that the admissibility decisions might be the most relevant for research on the admissibility issues of concern and as to application of formal admissibility requirements arising from Articles 34 and 35 of the Convention. On the other hand the Court's judgments, both Grand Chamber and the chamber ones, as well as the Commission case-law, might be of relevance for investigating the scope of application of a particular Convention provision at issue, applicability of a particular Conventional provision to particular circumstances of the case and

[1]. The comprehensive database of the Court's case-law, recently released in a new edition, which can be found at www.echr.coe.int.

[2]. One of the examples on the issue of non-enforcement is the decision of the Committee of Ministers taken in the case of Kaysin and Others v. Ukraine ((friendly settlement), no. 46144/99, 3 May 2001).

[3]. Such a technique is frequently applied by means of referring to the cited case-law mutatis mutandis, i.e. with relevant differences taken into account (for instance, case-law relating to "determination of civil right and obligations" applied to a case relating to "determination of a criminal charge").

[4]. This is usually done through "a contrario" technique or "compare and contrast" technique. One should also beware of the references for the case-law with the use of cf, e.g., i.e. or other Latin legal references, taking into account particular meaning of Latin abbreviations that are being used.

better understanding of the substantive issues relating to interpretation of the Convention.

To summarise present brief discussion of the Court's case-law, its sources and hierarchy, one might add that such a study is extremely useful for any kind of research relating to the Court's jurisprudence. The importance of taking into account the doctrinal views as to the hierarchy and legal "weight" of each piece of the Court's jurisprudence are important for establishing the most relevant legal arguments and making them sufficiently strong to prove the point under consideration. The idea is simple to understand, but not simple to apply. It can be summarised in the following way – relevant case-law should be used to support relevant arguments. Nevertheless, most importantly, case-law references should not be applied without need and should not be used for the sake of referencing as such, should not be misleading or unclear. Another important recommendation is planning your search in advance according and on the basis of structure of the relevant legal argument. In this respect one might cite and rephrase Sir Winston Churchill: "Plans are of great importance, not least important than planning."[1] The legal researchers, practitioners and European human rights law students are welcome to follow and apply the recommendations above, which are aimed at facilitating the challenging process of exploring the Court's judicial practice. Any further theoretical scientific discussion on the issue is welcomed.

[1] The original statement by Sir Winston says: "Plans are of little importance, but planning is essential".