**ՔՐԵԱԿԱՆ ԴԱՏԱՎԱՐՈՒԹՅՈՒՆ/CRIMINAL PROCEDURE/
УГОЛОВНЫЙ ПРОЦЕСС**

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*ՀՀ Վճռաբեկ դատարանի աշխատակազմի իրավական
փորձաքննությունների ծառայության գլխավոր մասնագետ,
ՀՌՀ իրավունքի և քաղաքականության ինստիտուտի քրեական իրավունքի և
քրեական դատավարության իրավունքի ամբիոնի դասախոս, ի.գ.թ.*

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DIALOGUE BETWEEN THE STRASBOURG COURT AND NATIONAL COURTS (CRIMINAL LIMB)

ՍՏՐԱՍԲՈՒՐԳԻ ԴԱՏԱՐԱՆԻ ԵՎ ԱԶԳԱՅԻՆ ԴԱՏԱՐԱՆՆԵՐԻ ԵՐԿԽՈՍՈՒԹՅՈՒՆԸ (ՔՐԵԱԻՐԱՎԱԿԱՆ ՀԱՅԵՑԱԿԵՏ)

ДИАЛОГ МЕЖДУ СТРАСБУРГСКИМ СУДОМ И НАЦИОНАЛЬНЫМИ СУДАМИ (УГОЛОВНО-ПРАВОВОЙ АСПЕКТ)

Introduction: Protocol No. 16 to the European Convention on Human Rights which entered into force for the Parties in 2018, enables the highest courts and tribunals of a State Party to apply to the European Court on Human Rights for advisory opinions on questions of principle related to the interpretation or application of the rights and freedoms defined in the European Convention on Human Rights.

The scientific problem of this article is the effectiveness of the new approaches for conducting judicial dialogue and thus for preventing violations of human rights and freedoms.

The concept of 'dialogue' has attracted considerable academic discussion as a tool for

describing, explaining and justifying different forms of interaction between sites of governance[1]. Judicial dialogue at the domestic level is also known for the structure of applying to the constitutional court. The idea of judicial dialogue has been discussed almost from the moment it was introduced. However, it never materialized into a legal proposal until the Brighton Conference on the Future of the ECtHR, organized by the British government in April 2012. The Brighton Declaration called on the Committee of Ministers to

draft a new protocol intended to expand the court's power, also upon request from the member states, to clarify interpretation of the questions in connection with a specific case at a national level. After the Brighton Conference, the Committee of Ministers drafted Protocol 16.

There is no legal definition of the concept of «dialogue" in international law. This term means the exchange of arguments in order to reach an agreement. It can be understood as a conversation, discussion or discourse - these are concepts widely accepted in European literature. The account of the dialogue may be descriptive or explanatory. Its consequence may be regulations ensuring a common understanding of the law. International judicial dialogue, as M. Matusiak-Frącczak points out, is a new method of interpreting law, which is gaining popularity in lawyers' analyzes and still raises many doubts both as to its very existence and definition[2]. The concept of dialogue also has a metaphorical dimension - it is supposed to be synonymous with openness, exchange of concepts, ideas and values carried out in a form appropriate to the statements of courts, i.e. through case law[3].

Main research: 'Judicial dialogue' was consistently regarded as a multi-dimensional concept. As one Justice expert-? put it, 'it does all depend on the context … because judges have conversations with one another in a lot of different contexts'. It was considered 'a phrase which can mean different things to different people in different contexts'. Judgments, however, were frequently described by the judges as the medium of 'formal' or 'jurisprudential' dialogue. Along with face-to-face meetings, which were described as the medium of 'informal' or 'personal' dialogue, this was said to constitute one the 'two basic dialogue levels' between the UK courts and the ECtHR[4].

The next feature of formal dialogue described by the judges is that it involves the courts actively seeking to influence one another. In this respect, it is predicated on a space for cross-influence between the courts. The ongoing presence of such influences in the decision-making of the UK courts and the ECtHR is well-recognised in the extra-judicial commentary. Lord Reed notes 'a dialectical process at work, as the European Court and national courts each influence the work of the other'.[5] Likewise, Paul Mahoney, the former UK judge at the ECtHR, notes a *'two-way*

[1] *Barry Friedman,* 'Dialogue and Judicial Review' (1993) 91(4) Mich LR 577; *Peter W. Hogg and Allison A.Bushell,* 'The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such A Bad Thing After All)' (1997) 35(1) Osgoode Hall LJ 75; *Luc Tremblay,* 'The Legitimacy of Judicial Review: The Limits of Dialogue between Courts and Legislatures' (2005) 3(4) IJCL 617; *Peter W. Hogg, Allison A. Bushell Thornton and Wade K. Wright,* 'Charter Dialogue Revisited: Or "Much Ado About Metaphors"' (2007) 45(1) Osgoode Hall LJ 1; *Ming-Sung Kuo,* 'In the Shadow of Judicial Supremacy: Putting the Idea of Judicial Dialogue in its Place' (2016) 29(1) Ratio Juris 83; *Davies, Gregory,* The legitimising role of judicial dialogue between the United Kingdom courts and the European Court of Human Rights. PhD Thesis, Cardiff University 19 December 2017.

[2] *M. Matusiak-Frącczak,* Interpreting Law Through International Judicial Dialogue by Polish Courts, „Bratislava Law Review" 2020, vol. 4(2), s. 49.

[3] *M. Safjan,* Europa sędziów, Europa dialogu, „Na Wokandzie" 2011, nr 7, s. 54–55.

[4] *Davies, Gregory,* The legitimising role of judicial dialogue between the United Kingdom courts and the European Court of Human Rights. PhD Thesis, Cardiff University 19 December 2017.

[5] *Bjorge, Eirik,* Domestic Application of the ECHR: Courts as Faithful Trustees, International Law In Domestic Legal Or-

adjudicatory traffic'[6] by which the courts have engaged in 'a continuing exchange on the subject of a specific human rights problem in the country, with the position on each side progressively evolving in the light of the other's judgments'.

Although the implementation of the advisory opinion procedure seems to be *prima facie* a great solution as it will presumably reduce the burden of ECtHR's caseload on the one hand and help domestic courts to develop and protect human rights standards on a national level on the other hand, it was cautioned in the legal theory by some scholars that the advisory opinion procedure does not entail an actual decrease of the ECtHR's caseload but only the distribution of ECtHR's activities into two separate competences: the advisory opinion and the application procedure[7].

Interjudicial dialogue is a debate, conversation or exchange of points of view between two or more judges or courts from different countries, whether or not they are nationals. It is the most desirable model of court cooperation in law enforcement. It may also be the result of the state's relationship with the legal system and an international or supranational court. Dialogue may be conducted between the national courts (as in the case of ordinary courts and the constitutional court), between the national and international or supranational courts (as in the case of ordinary or constitutional national courts and judges entering into dialogue with the Inter-American Court or with the European Court). It may also take place between international or supranational courts, an example of which is the dialogue between the regional human rights tribunals.

The dialogue of judges involves the exchange of arguments, interpretations and legal solutions. In practice, it manifests itself in the explicit or implicit citation of a foreign judgment by a judge. It is a dialogue that is most often initiated by judges and allows mutual recognition of jurisdiction. When conducting a dialogue, a judge seeks a solution to a legal issue beyond the boundaries of his or her own jurisdiction.

Dialogue also enables judges to be more aware of the environment in which they operate, making them aware that they belong to an international legal community, each member of which contributes to the development of a global normative system for the benefit of humanity[8].

Human rights are characterized by two important features that will likely influence the future of the judicial dialogue: *progressiveness and universality*. Regarding the first of these, the European Court and the Inter-American Court have confirmed that human rights treaties are *"living instruments"* whose interpretation must be accompanied by the evolution of time and the development of living conditions. Due to this, the current dialogue will probably continue and develop in the future, as long as its participants remain committed to the common project. Otherwise, we will not be dealing with dialogue, but with interaction. This is an extremely important distinction, because in the area of international human rights law there is a clear need to develop unanimity in the interpretation and application of this law.

Tribunals realize that they do not operate in isolation but they are part of a network of states, international institutions and non-governmental actors. The developed dialogue is leading to the emergence of increasingly convergent international human rights law. The African Court and the

ders (Oxford, 2015; online edn, Oxford Academic, 19 Nov. 2015).

[6] *Paul Mahoney,* 'The Relationship between the Strasbourg Court and the National Courts' (2014) 130 LQR 568, 572.

[7] *Đorđević, S.,* Protocol 16 to the European Convention on Human Rights and Freedoms, Niš, Law and Politics, vol. 12, 2/2014, p. 109.

[8] *A. Nollkaemper,* The Role of Domestic Courts in the Case Law of the International Court of Justice, „Chinese Journal of International Law" 2006, vol. 5(2), s. 301–322.

American Court generally apply a universalist approach, relying heavily on UN proposed and regional human rights instruments (including soft law), as well as on decisions of the UN and regional human rights monitoring bodies in interpreting the provisions of the relevant regional treaty, while the European Court traditionally considers whether there is any regional consensus on the issue. In recent years, however, he has also been increasingly adopting a universalist approach[9].

Dialogue allows each tribunal to contribute to the progressive development of international human rights law by the judges voluntarily drawing on the wealth of opinions and practical knowledge of their colleagues from other tribunals who, albeit in different contexts, have faced similar problems. This does not mean, however, that regional tribunals have a legal obligation to participate in such a dialogue, which is to consider the criteria adopted by other courts in a similar case. Despite cultural, legal, social and political differences on individual continents, judges must face similar problems in the process of adjudication. This is why it is so important that they have the opportunity to analyze decisions made in other jurisdictions, especially since each of them deals with many cases of fundamental importance for the international system of human rights protection. This shows the potential for judicial dialogue in the area of human rights to be conducted on a global forum. Currently, this is an issue that should be analyzed by different judicial authorities from different human rights protection systems.

The considerations presented are only a voice in the discussion regarding the nature and role of dialogue between regional human rights tribunals. It can be said with full responsibility that fears regarding the undermining of the universality of human rights by regional human rights protection systems have not come true. Dialogue between regional tribunals is now more necessary than ever. It can be an effective instrument for achieving consensus on many sensitive human rights issues. Only through cooperation the increasingly complex problems that tribunals have to face could be solved. Dialogue is the best way to effectively ensure the guarantees of international human rights law.

The proposals formulated by Enrico Albanasi are related to the constitutional aspect of the new institution of advisory opinions. First of all, it can be concluded that this institution may lead to strengthening the constitutional position of the ECtHR. In this context, the jurisprudence of the Tribunal, and in particular the level of substantive opinions issued, will be of considerable importance[10]. The criticism of the first opinion for France was rightly accused of being laconic and of questionable substantive level, especially as regards the part containing instructions for the national court asking questions. Issuing this type of advisory opinions will certainly not encourage subsequent highest courts and national tribunals to submit further questions, will not lead to the development of judicial dialogue through this institution, nor will it strengthen the position of the ECtHR as the constitutional court of Europe. Subsequent opinions issued by the ECtHR certainly present a higher substantive level, although they still seem to be insufficiently based on principles, which is an important requirement for constitutional judgments. Only a sufficiently high level of justification for the judgment and its basing on the principles of the Convention and, more broadly, international law allow it to be called constitutional[11].

[9] *M. Killander,* Interpreting Regional Human Rights Treaties, „International Journal on Human Rights" 2010, no. 13, s. 8.
[10] *Enrico Albanesi,* „The European Court of Human Rights' Advisory Opinions Legally Affect Non-ratifying States: A Good Reason (From a Perspective of Constitutional Law) to Ratify Protocol No. 16 to the ECHR", European Public Law, nr 1 (2022): 1-2.
[11] *Wildahber,* „A Constitutional Future for the European Court of Human Rights" Human Rights Law Journal, nr 507

Armenia ratified the Protocol on 31 July 2017. The Protocol establishes a mechanism enabling the highest national jurisdictions of the Member States to request advisory opinions on the interpretation of the Convention from the European Court of Human Rights.

Still, it is important to stress out that, according to the Protocol No. 16, a national body must fulfill three conditions to request an opinion:

(1) the body must constitute a court or tribunal in the meaning of the ECHR,

(2) legal norms establishing the given body's position in the structure of national bodies of power have to put it on the top of the hierarchical structure of competence in the given legal system, and

(3) in a proceeding before this body, questions of principle relating to the interpretation or application of the rights and freedoms defined in the ECHR need to be raised.

One of the most important aspects of the request for the advisory opinion in this regard is also the nature of the questions on which a domestic court or tribunal may request the advisory opinion.

Advisory opinions shall not be binding. Since the opinions take place in the context of the judicial dialogue between the ECtHR and the domestic courts and tribunals, it is on the requesting court to decide on the effects of the advisory opinion in the domestic proceedings. The judicial dialogue between national courts and the ECtHR is characterized by a **shared responsibility**[12]**,** meaning that national courts have the most important role to play in guaranteeing the primary protection of the ECHR, while the ECtHR only has a supervisory role and decides in individual cases whether a State has complied with its obligation of human rights protection.

It is the second time that Armenia has requested an advisory opinion under Protocol No. 16 to the European Convention on Human Rights.

In a letter of 2 August 2019 sent to the Registrar of the European Court of Human Rights, the Armenian Constitutional Court requested the European Court, under Article 1 of Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, to give an advisory opinion. That request arose in the context of two cases currently pending before that court relating to protests which took place in Armenia between late February and early March 2008 and in which questions arose regarding the interpretation and application of the provision of the Armenian criminal code which penalised the overthrowing of the Armenian constitutional order[13].

The ECtHR refused to answer questions 1 and 2, considering that the answers to these questions would be of an abstract and general nature, thus going beyond the scope of the advisory opinion provided for in Protocol 16. In turn, when answering the third question, the ECtHR made, among other things: a detailed comparative analysis of the legislative solutions of states parties regarding the use of «blank reference» and « legislation by reference» techniques, concluding that these techniques are widely used in individual states in their criminal law. However, in order to comply with Article 7, the criminal law provisions defining the offense must meet the general requirements of «quality of law», that is, they must be sufficiently precise, accessible and predictable in their application. According to the ECtHR, the most effective way to ensure clarity and predictability is

(2002): 164.

[12] *Gerards, J.,* The European Court of Human Rights and the National Courts: giving shape to the notion of "shared responsibility", in: Gerards, J., Fleuren, J., op. cit. p. 23.

[13] Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law, P16-2019-001, 29/05/2020.

to use explicit references, and the provision of references should specify the constitutive elements of the offense. Moreover, the provisions to which reference is made cannot extend the scope of criminalization defined by the referring provision. Having defined these conditions, the ECtHR found that both referral techniques used in the criminalization of acts or omissions are not in themselves incompatible with the requirements of Article 7 of the Convention. The reference provision should enable an individual, if necessary with the help of legal advice, to predict what conduct will result in him being held criminally liable. In turn, in answering the fourth question, the Court recalled that Art. 7 of the Convention unconditionally prohibits the retrospective application of a criminal law if it is detrimental to the accused. Moreover, in accordance with the principle of retrospective application of more lenient criminal law, which is set out in the case law of the ECtHR (in the case of Scoppola v. Italy), the Court confirmed that Art. 7 sec. 1 of the Convention guarantees not only the principle of non-retrospectivity of more stringent criminal laws, but also, implicitly, the principle of retrospectivity of more lenient criminal laws. This principle is expressed by the rule that in the event of discrepancies between the criminal law in force at the time of committing the act and subsequent criminal provisions adopted before the final judgment is issued, the courts must apply the law whose provisions are most favorable to the defendant.

The second request of the Armenian Court of Cassation was made in the context of criminal proceedings against two police officers implicated in the ill-treatment in April 2004 of the applicant in the case of *Virabyan v. Armenia*. In its judgment of 2 October 2012 in that case, the Court unanimously found procedural and substantive violations of Article 3. More specifically, it found that the applicant had been subjected to torture and that the authorities had failed to carry out an effective investigation into his allegations of ill-treatment. In the context of the Committee of Ministers' supervision of the execution of the Court's judgment under Article 46 § 2 (not as yet closed), new criminal proceedings were instituted and charges were brought against the police officers implicated in Mr Virabyan's ill-treatment under Article 309 § 2 of the Criminal Code. Whilst the trial court found that the defendants had committed an offence under that provision, it held that they were exempted from criminal responsibility by virtue of the ten-year limitation period in Article 75 § 1(3) of the CC which had expired in April 2014. This decision was upheld by the Court of Appeal. The prosecutor lodged an appeal on points of law to the Court of Cassation which then had to determine whether the proceedings were to be considered under the aforementioned ten-year limitation period or whether they were to be seen as covered by the exception in Article 75 § 6 of the CC, whereby no limitation period could apply to certain types of offences (offences against peace and humanity or envisaged in international treaties to which Armenia was a Party and which prohibit the application of limitation periods). The Court of Cassation thus requested the European Court to give an advisory opinion on the following question:

"Would non-application of statutes of limitation for criminal responsibility for torture or any other crimes equated thereto by invoking the international law sources be compliant with Article 7 of the European Convention, if the domestic law provides for no requirement for non-application of statutes of limitation for criminal responsibility?"[14]

It should be mentioned that the advisory opinion requested by the Court of Cassation was

[14] Advisory opinion requested by the Armenian Court of Cassation Request no. P16-2021-001 26.4.2022 [GC], Advisory opinion on the applicability of statutes of limitation to the prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture.

included in the list[15] of key cases 2022 under Article 7 of the Convention.

Based on the above, it can be noted that the highest courts of Armenia create case law within the framework of the 16th protocol. It should be noted that the issues raised by the higher courts were of a unique nature, on which positions have not been expressed before.

Regardless of the fact that within the framework of criminal cases, the highest courts of the Republic of Armenia applied for an advisory opinion, there are currently no clear domestic procedural regulations for the use of this mechanism, which creates uncertainty in terms of the proper organization of the requesting process. In particular, it is not clearly provided whether to suspend the criminal case and apply to the European Court or without suspension is also possible. It is not specified whether the reporting judge should ensure document circulation with the European Court in the case of a collegial composition.

The next issue concerns the cases in which the appellants have the right to withdraw the appeal. According to the art. 358 of Criminal procedure code of RA (date of entry into force 01.07.2022) the person who brought the appeal or the person for the protection of whose interests the appeal was brought shall be entitled, by submitting a motion to the respective higher Court, to withdraw the appeal or refuse from a part thereof prior to the reporting by the Presiding Judge or any of the Judges in a Court session, and in case of judicial review conducted under written procedure as envisaged by this Code, within the time set by the Court in the decision to admit the appeal to the proceedings. An appeal brought by the Prosecutor may be withdrawn also by the Superior Prosecutor.

In cases where the Court of cassation finds that it is possible to reject the petition to withdraw the appeal for the development of the law, it can be governed by part 4 of the same article, because in case of cassation, the motion to withdraw an appeal may be not granted, if examination of the appeal is of fundamental significance for ensuring the uniform application of the law or other normative legal act or for eliminating the fundamental violations of human rights and freedoms.

That's way for future we suggest to change criminal procedural code of RA and add new article which will be called *Obtaining an advisory opinion from the European Court of Human Rights*.

Conclusion: Human rights tribunals, as elements of the global justice system, must therefore complement and strengthen each other in the promotion of human rights. Hopefully, the dialogue initiated between them will continue to develop, setting standards for the international protection of human rights. True dialogue must be a source of finding common solutions to emerging problems, and its participants should always be ready to make concessions and be guided by respect for their partners. Responsibility and mutual respect are features that should characterize the dialogue conducted by regional human rights tribunals, which are the final interpreters of human rights and freedoms guaranteed in the relevant treaties.

Ամփոփագիր: Հոդվածը նվիրված է Եվրոպական Կոնվենցիայի 16-րդ արձանագրության հիման վրա իրականացվող բարձր դատարանների երկխոսությանը: Հոդվածում քննարկվում է վերպետական դատական ատյանների հետ երկխոսության կառուցակարգերի արդյունավետությունը, ինչպես նաև ներկայացվել է խորհրդատվական կարծիք ստանալու վերաբերյալ ՀՀ բարձրագույն դատական ատյանների փորձը: Դատարանի՝ խորհրդատվական կարծիքներ տալու նպատակով իրավասության ընդլայնումը կուժեղացնի Դատարանի և

[15] List of cases 2022 recommended by the Jurisconsult and approved by the Bureau https://www.echr.coe.int/documents/d/echr/Cases_list_2022_ENG.

ազգային իշխանությունների միջև փոխգործակցությունը և այդպիսով կամրապնդի Կոնվենցիայի կիրարկումը՝ սուբսիդիարության սկզբունքի համաձայն: Բարձրագույն դատարանները և տրիբունալները, կարող են դիմել Եվրոպական դատարան՝ Կոնվենցիայով կամ դրա արձանագրություններով սահմանված իրավունքների և ազատությունների մեկնաբանման կամ կիրառման սկզբունքային հարցերի վերաբերյալ խորհրդատվական կարծիքների տրամադրման համար: Հարցում ներկայացնող դատարանը կամ տրիբունալը կարող է դիմել խորհրդատվական կարծիքի համար միայն իր կողմից քննվող գործի շրջանակներում: Հարցում ներկայացնող դատարանը կամ տրիբունալը պատճառաբանում է խորհրդատվական կարծիքի իր հարցումը և տրամադրում է տեղեկություններ քննվող գործի համապատասխան իրավական և փաստական հանգամանքների վերաբերյալ: Խորհրդատվական կարծիքները պատճառաբանվում են: Եթե խորհրդատվական կարծիքը չի արտահայտում, ամբողջությամբ կամ մասամբ, դատավորների միաձայն կարծիքը, ապա յուրաքանչյուր դատավոր իրավունք ունի դրան կցելու իր առանձին կարծիքը: Խորհրդատվական կարծիքները փոխանցվում են հարցում ներկայացնող դատարանին կամ տրիբունալին և այն Բարձր պայմանավորվող կողմին, որին այդ դատարանը կամ տրիբունալը պատկանում է:

Аннотация. Статья посвящена диалогу высших судов на основе 16-го протокола Европейской конвенции. В статье рассматривается эффективность диалоговых структур с наднациональными судами, а также опыт высших судов РА по получению консультативного заключения. Расширение полномочий Суда по вынесению консультативных заключений будет способствовать дальнейшему укреплению взаимодействия между Судом и национальными властями и тем самым обеспечит более эффективное применение Конвенции в соответствии с принципом субсидиарности. Высшие суды и трибуналы могут запрашивать у Европейского Суда консультативные заключения по ключевым вопросам, касающимся толкования или применения прав и свобод, закрепленных в Конвенции и Протоколах к ней. Запрашивающий суд или трибунал может обратиться за консультативным заключением только в связи с делом, находящимся на его рассмотрении. Запрашивающий суд или трибунал должен мотивировать свой запрос и представить юридические и фактические обстоятельства, имеющие значение для рассматриваемого им дела.

Консультативные заключения должны быть мотивированными. Если консультативное заключение в целом или частично не выражает единогласного мнения судей, то любой судья вправе представить свое особое мнение. Консультативные заключения направляются запрашивающему суду или трибуналу и Высокой Договаривающейся Стороне, к которой относится этот суд или трибунал.

Բանալի բառեր *- դատական երկխոսություն, ընդհանուր պատասխանատվություն, դատարան, խորհրդատվական կարծիք, հիմնարար իրավունքներ, կոնվենցիայի արձանագրություն:*

Keywords: *judicial dialogue, shared responsibility, court, advisory opinion, fundamental rights, protocol of convention.*

Ключевые слова: *судебный диалог, общая ответственность, суд, консультативное заключение, основные права, протокол конвенции.*

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