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Application of Law in the Legal Order of the Council of Europe

Stosowanie prawa w porządku prawnym Rady Europy

ABSTRACT

This article is devoted to the application of law in the legal order of the Council of Europe. It presents guidelines for the decision-making process of the application of law applied in the legal area of the European Convention on Human Rights and the European Social Charter. The aim of this article is to present the characteristics of the decision-making process of the application of law in terms of human rights protection on European and supranational level, as well as the differences between such processes carried out on the basis of the ECHR and the ESC.

Keywords: human rights, legal order, decision-making process, the application of law, judicial type, controlling mechanism

1. INTRODUCTION

The aim of this article is to analyse the issue of the application of law in the legal order of the Council of Europe. This organization has created the world's first regional system of human rights protection that covered all the European countries and thus elevated the decision-making processes for the application of law concerning human rights from the domestic to the international level.

This article attempts to show the disproportion between two suborders that function within the framework of the legal order of the Council of Europe: the European Convention on Human Rights (further referred to as the ECHR or the Convention) which protects first-generation rights, and the European Social Charter which secures second-generation rights. The main goal is to present the inter-institutional relations between domestic authorities and the Council of Europe bodies. These relations determine the processes of the application of law, both

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on the European and domestic level; at the same time, they are different for each of the subsystems. The distinct character of the obligations assumed on the basis of those two legal acts has influence on the structure of the control mechanism, which in turn, determines the effectiveness of the operationalisation concerning human rights protection. The conventional control mechanism used in the judicial type of the application of law in the European Court of Human Rights (further referred to as the ECtHR or the Court) should be considered to be effective. However, the model determined by the ESC based on reporting and recommendation is not used in the judicial type and has limited effectiveness.

2. COUNCIL OF EUROPE AND HUMAN RIGHTS PROTECTION IN EUROPE

The Council of Europe (CE) was founded on 5 May 1989 in London[1] and is one of the organizations on the legal map of Europe that deal with the subject of human rights protection. Currently, from the perspective of over 60 years of its activity, one can and should emphasize its pioneering role in the realisation of the idea of human rights protection on the European level, which in time matured and grew to be an authority that determines the normative way of understanding standards for human rights protection. Today, we can treat as an axiom the words that highlight the undoubtedly great role played by the Council of Europe as an embodiment of the Pan-European cooperation; the words that stress the actual input of the Council of Europe into shaping the European identity and its great influence on the transformations in Central, Eastern and Southern Europe which have facilitated the creation of "the modern model of democracy, human rights protection and the rule of law".[2]

However, it should be noted that on the European, supranational level of protection, the CE is not the only organization that deals with these matters. The European Union (EU) and the Organization for Security and Co-operation in Europe (OSCE) are also worth mentioning.[3] Furthermore, one cannot forget about the European scope of the UN activities concerning human rights protection.[4] The European Union, created on the basis of the European Communities, focused at

[1] The Articles of Association were signed by the ministers from Belgium, Denmark, France, Ireland, Netherlands, Luxemburg, Norway, Sweden, Great Britain and Italy. Those countries should be treated as the founders of the Council of Europe and therefore, as the pioneers of the European system of human rights protection.

[2] P.A. Świtalski, *Rola Rady Europy w systemie organizacji międzynarodowych*, [in:] *Rada Europy a przemiany demokratyczne w państwach Europy Środkowej i Wschodniej w latach 1989−2009*, ed. J. Jaskiernia, Toruń 2010, p. 13.

[3] See more about the OSCE: L. Łukaszuk, A. Skowroński, *Europejskie prawo pokoju i bezpieczeństwa*. *Materiały i komentarze*, Warsaw 2003.

[4] P.A. Świtalski, *Rola Rady Europy*..., p. 13.

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the beginning solely on the issues of economic integration. There was even a view that human rights protection is a matter of no impact on the processes of economic integration.[5] Soon it turned out that the community law may be a source of human rights violations. Upon this discovery, the works on a community system of human rights protection started, and their crowning achievement was entering into force of the Charter of Fundamental Rights of the European Union, following the Lisbon Treaty.[6] The OSCE as a European regional organization was founded on the basis of the Conference on Security and Co-operation in Europe. The movements to organize a European conference that would enter into talks about the security of – above all, but not exclusively – the European continent, should be dated back to the 1950s. However, the "iron curtain", and more importantly, its consequences (the Cold War and the political antagonism between the East and the West) – created a precipice which for many years made it impossible to convey such a meeting of European countries. It only became possible at the beginning of the 1970s, as a result of many diplomatic efforts, and led to the signing of the Helsinki Final Act of the Conference on Security and Co-operation in Europe on 1 August 1975. The institutionalization of the cooperation in the field of European security within the framework of the Conference progressed in stages.[7] Finally, during the summit in Budapest in 1994, the decision was made to transform the Conference into a regional organization.[8] The transformation was finalized on 1 January 1995.

Although the CE, the EU and the OSCE are organizations that do not share their objective scope of activities, their common denominator is human rights protection. The subjective perspective of these bodies differs as well. The subjective scope of the OSCE is the broadest one because it extends beyond Europe and includes countries from North America and Asia. The Council of Europe includes almost all countries in Europe (except for Belarus), and the European Union currently functions on the basis of 27 member states. The disproportions in

[5] L. Leszczyński, B. Liżewski, *Ochrona praw człowieka w Europie. Szkic zagadnień podstawowych*, Lublin 2008, p. 130.

[6] The Charter of Fundamental Rights of European Union was established and signed on 7 December 2000 during a summit of the European Council in Nice on behalf of the European Parliament, the EU Council and the European Commission. It was amended and signed again during a summit in Lisbon on 12 December 2007. It became legally binding under the Lisbon Treaty which was signed on 13 December 2007 and came into force on 1 December 2009.

[7] More: P. Grudziński, *KBWE/OBWE wobec problemów pokoju i bezpieczeństwa regionalnego*, Warsaw 2002, pp. 35−43.

[8] OSCE is an international organization with a regional character under Chapter VIII of the United Nations Charter. The composition of the OSCE may cause reflections on regionalism and regional organization, because apart from European countries such countries as the United States, Canada, Armenia, Azerbaijan, Kazakhstan, Uzbekistan, Kyrgyzstan, Tajikistan and Turkmenistan are members of the OSCE. There are many opinions in the international law doctrine on how to define a regional organization. The main problem consists in establishing the criteria of regionalization that would not only concern the geographical aspect.

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the number of members ought to be mentioned not only because of statistics, but also due to the fact that formally the articles of association of these organizations do not introduce territorial delineations. Rather, the idea of membership is based on the criterion of the level of development[9] and the requirement to fulfil all the formal prerequisites to become a member. It should be highlighted that the three organizations have an institutionalized character. As a result, the architecture of institutional Europe[10] has been discussed in the context of evaluation of this state of affairs; it is so condensed that one should ponder the functionality of supranational network of European institutions, both in the context of relations between those institutions, and in the context of relations between an organization and its member states. The question arises – and it is justified when it comes to the subject matter, but extends beyond the scope of this study – whether the CE, the EU and the OSCE are organizations which are competitive against one another, complementary, or whether their activities are indifferent to each other.[11] The author will not formulate any specific theses at this moment and on this subject. However, it is worth mentioning that critical opinions on these relations have been increasingly frequent in the professional literature. In her analysis of the judiciary activity of the European Court of Human Rights and the so called "co-governance of interpretation" in the Court of Justice E. Łętowska mentions that "Silent assumption that there is a dialogue in this matter is too optimistic as currently this dialogue is more of a multitude of monologues".[12] In the relations between the ECtHR and the UN treaty monitoring bodies there is no formal legal framework of cooperation.[13] This means that in the environment of multi-centric law "putting into use" the common legal area of human rights interpretation and application is a difficult process that requires much effort, including procedural measures, compromise, and an approach that would be more universal. This kind of approach is crucial, because nowadays on both national and international levels, human rights are not only a philosophical category (although, in my opinion, they still are), but they

[9] B. Gronowska, T. Jasudowicz, M. Balcerzak, M. Lubiszewski, R. Mizerski, *Prawa człowieka i ich ochrona*, Toruń 2010, p. 81.

[10] F. Benoit-Rohmer, H. Klebes, *Council of Europe law. Towards a Pan-European legal area*, Warsaw 2006, p. 156; P.A. Świtalski, *Rola Rady Europy…*, p. 14; *idem*, *Miejsce Rady Europy w europejskiej architekturze instytucjonalnej*, [in:] *60 lat rady Europy, Tworzenie i stosowanie standardów prawnych*, ed. H. Machińska, Warsaw 2009, pp. 11−34.

[11] More on these relations: J. Jaskiernia, *Rada Europy, Unia Europejska i OBWE w systemie ochrony praw człowieka – synergia działań czy konkurencja?*, [in:] *Efektywność Europejskiego Systemu Ochrony Praw Człowieka. Ewolucja i uwarunkowania Europejskiego Systemu Ochrony Praw Człowieka*, ed. J. Jaskiernia, Toruń 2012, pp. 838–867.

[12] E. Łętowska, *Dialog i metody. Interpretacja w multicentrycznym systemie prawa (część II)*, „EPS" 2008, No. 12, p. 4.

[13] R. Wieruszewski, *Europejski Trybunał Praw Człowieka a Komitet Praw Człowieka – rywalizacja czy współdziałanie*, [in:] *60 lat Rady Europy…*, p. 89.

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have become a legal category, too. For this reason the view that human rights are not a matter of philosophy is being expressed more often.[14] The problems of relations between European institutions on the issue of human rights have been mentioned here to show that the Council of Europe is not the only organization in Europe that has the exclusive right and monopoly for guaranteeing human rights protection. The next part of this study will focus on the issue of the application of law in the legal order of the Council of Europe in reference to respect for and protection of human rights.

3. ORDER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

3.1. Systemic issues

The European Convention for the Protection of Human Rights and Fundamental Freedoms[15] drafted in Rome on 4 November 1950 is an international agreement that protects personal and political human rights. Poland became a party to the Convention on 19 January 1993.[16] This act is definitely a relevant one – it started the creation of the first in the world regional system of human rights protection, a system that is now considered to be the most effective[17], a system that is perceived as the core of the European law on human rights[18]; a system on which the Council of Europe bases its activities to a great extent. The possibility to attribute those characteristics to the Convention is dictated mostly by the innovativeness of the normative solutions adopted on the basis of the ECHR (above all, the institution of individual complaint and the implementation of the ECtHR decisions in national law) and the practice that has been shaped by these solutions.

The Council of Europe, founded in London in 1949, is the first institutionalized European organization which, from the European perspective, has a global range with its 47 member states. The Council of Europe focuses mainly, according to its articles of association, on promoting the idea of democracy based on respect for fundamental human rights and freedoms. Although within the organization over 200 conventions on human right protection have already been ratified, the institutionalized protection of First and Second Generation Rights is connected

[14] *Idem*, *Od praw obywatelskich do praw człowieka – dylematy ewolucji polskiego systemu ochrony praw człowieka*, „Studia Prawnicze" 2002, No. 2, p. 15.

[15] M. Balcerzak is right when he writes that the original name of this agreement does not include the adjective "European", although it is commonly used, as proven by this article. Cf. M. Balcerzak, *Europejska Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności z wprowadzeniem*, Warsaw 2011, p. IX.

[16] "Official Journal of Laws", 1993, No. 61, item 284.

[17] K. Drzewicki, *Reforma Europejskiego Trybunału Praw Człowieka – filozofia zmian czy zmiana filozofii?*, „EPS" 2006, No. 6, p. 4; W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe*, Warsaw 2004, p. 433.

[18] T. Jasudowicz, *Administracja wobec praw człowieka*, Toruń 1996, p. 20.

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with the two main conventions, namely the European Convention on Human Rights and the European Social Charter. These documents determine two subsystems, and the subsystem shaped by the ECHR is definitely more significant. This is generally dictated by the legal character of the ECHR and its immediate effect that has facilitated the creation of a control mechanism based on individual complaints.

Creating a regional-European system of human rights protection stemmed from the belief that such a system can guarantee human rights protection in a fuller and more effective manner.[19] There are many obstacles on the way to achieving this goal on a national level – the shortcomings of the judicial system, the way the normative regulations are formulated, and, finally, conscious and deliberate activity of public officers, which is in many cases concealed. The system of conventional human rights protection, based on the activity of the Court of Human Rights, was established to reach a state of justice where the rights of an individual in a country are not violated. For an individual, the ECtHR serves as a guarantor of restorative justice when the individual seeks justice is Strasbourg because he or she cannot find it in their own country.

The convention system determines the relation between the Court and the member states of the Council of Europe based on the principle of subsidiarity. The relation results *expressis verbis* from art. 13 and 35, section 1 of the ECHR and is above all connected with the requirement to fulfil all the admissibility criteria, among which the most important is the condition that the Court deals with a matter only after all domestic remedies have been exhausted (art. 35, sec. 1). This and other conditions position the Court as a body which is not meant to substitute domestic courts. The convention system is based on an assumption that an individual should pursue justice and find it in his or her own country. If human rights have been violated, authorities in the country have the primary competence to use its domestic bodies to verify the violation and to repair the state of affairs. The ECtHR functions as a supplementary body for the domestic judiciary system, which means that it is a body whose activities are of secondary character. The Court intervenes on the basis of a previously filed individual complaint only when domestic legal measures prove to be insufficient.

The subsidiary character of the ECtHR's position in reference to domestic law systems does not result solely from conventional normative solutions. It is also based on the judicial decisions of the ECtHR that has been consistent in its stand, starting from the "Belgian Linguistic case" from 1968[20], according to which "the Court cannot assume the role of competent national authorities, for it would there-

[19] A. Wiśniewski, *Koncepcja marginesu oceny w orzecznictwie Europejskiego Trybunału Praw Człowieka*, Gdańsk 2008, p. 16.

[20] Belgian Linguistic case (case „relating to certain aspects of the laws on the use of languages in education in Belgium v. Belgium), judgment from 23 July 1968, complaint No. 1474/62 et al.

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by lose sight of the subsidiary nature of the Convention.[21] The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the Convention".[22] As a conclusion it should be stated that the subsidiary role of the ECtHR determines the nature of the European system of protection. It is justified both substantively, which is connected with the fundamental role of a state as a guarantor of human right protection, and functionally, which refers to arguments from the proper activity of the Court in Strasbourg.

3.2. Legal character of the obligations resulting from the European Convention on Human Rights and the decision-making process of the application of law

Objective development of international law norms included the issue of human rights in the system in the second half of the previous century. This process was a result of an initiative of countries which experienced the tragedy of war and saw the shortcomings of the system of protection implemented solely on a national level; they decided to elevate the protection to the international level. Human rights – a subject of regulations that was until then entirely in the legislative authority of countries – entered the legal area of international law, became acquainted with it, strengthened its position and is still developing. However, this matter extended so far beyond the framework of classic international law that it gained the status of its separate branch.[23] This sub-branch, which currently has the status of international human rights law, is now so complex that within its framework one can classify treaties according to various criteria: for example, from the geographical point of view we have treaties that have universal[24] or regional[25] character. If we base the criterion on the character of obligations, then we can

[21] Belgian Linguistic case (case „relating to certain aspects of the laws on the use of languages in education in Belgium v. Belgium), judgment from 23 July 1968, complaint No. 1474/62 et al.

[22] *Ibidem*, § 10.

23 A. Michalska, *Prawa człowieka w systemie norm międzynarodowych*, Warsaw – Poznań 1972, p. 6.

[24] System of universal protection started when the UN Assembly adopted the Universal Declaration of Human Rights is based mainly of two treaties from 1966: the International Covenant on Civil and Political Rights which came into force on 23 March 1976 and the International Covenant on Economic, Social and Cultural Rights which has been binding since 8 January 1976. Apart from these documents the system includes an array of conventions which protect various aspects of human rights (e.g. prohibition of discrimination, tortures, human trafficking; protection of children's rights, etc.)

[25] The process of establishing regional systems of human rights protection has its roots in Europe, where the European Convention on Human Rights and the European Court of Human Rights were established. This pioneering system which protects human rights has become a role model for the regional systems that came afterwards: the Inter-America and African systems.

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distinguish international agreements that protect personal and political rights, and agreements that outline protection of economical, social and cultural rights. Assigning a particular international agreement to one of the given criteria determines both the type and the process of the application of law.

International agreements that regulate personal and political human rights, including the ECHR, have a structure that is very different from the agreements that we would refer to as "classic". They constitute a category of the so-called normative treaties with a vertical nature. They become effective on a horizontal level between countries, but they do not regulate relations between those countries. The purpose of such agreements is to shape the area of obligations of a state towards an individual (vertical level), which, given this individual the right to demand from the state, guarantees to resolve rights to whose protection the country committed itself by becoming a party to such an international agreement. Therefore, these agreements shape objective obligations of a state towards its individuals, and a normatively determined system of protection secures those obligations. The effectiveness of the system depends not only on the legal character of the obligations arising from the agreement, but also on the features of the decision-making body established to protect the rights (whether it is a judicial or non-judicial body). The system may also function based on the principles stated in advance in an international agreement, based on the consent of the countries that express their will to become a party to the agreement through the act of ratification. Ratification is an act that not only confirms becoming a party to the international agreement, but is also an essential prerequisite for this agreement to become binding.[26]

When it comes to the entire scope of international law treaties, one may say that treaties protecting human rights have a distinct character. The structural differences in the outline of international agreements, based on the criterion of focusing on the obligation and distinguishing authorized subjects, exert influence on the nature of the decision-making process, and above all, on the differences in the process of statutory interpretation.

3.3. The decision-making process and its type in the application of law

The decision-making process in the ECHR order represents the judicial type of the application of law, since it was classified as such according to the basic criteria of judicial and non-judicial types.[27] The European Court of Human Rights is an independent judicial authority with independent judges. From the point of view of the system, the Court has become almost omnipotent in its independence, and the freedom of judges is so great that it has allowed to create a specific statutory interpretation; an interpretative method applicable only in the

[26] A. Wyrozumska, *Umowy międzynarodowe – teoria i praktyka*, Warsaw 2006, p. 167.

[27] L. Leszczyński, *Typy stosowania prawa a model decyzyjny procesu decyzyjnego*, this volume, pp. 27–47.

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ECtHR. The actions of the Court are based on its authority arising from the European Convention on Human Rights. The rest of its features also comply with the judicial type. The proceedings are initiated mainly on the basis of an individual complaint, in other words, upon receipt of a claim or a motion. They focus on the litigation between a state and an individual, which is typical of the classic judicial type, although not exclusive to it (the judicial type may also be realized in the form of non-litigious proceedings). The decision on the application of law takes the form of a written ruling whose features extend far beyond the classic ones i.e., individual and specific character. Although the Court issues judgments in individual cases, they influence all the countries of the system through the standards that they establish. It should therefore be stated that although the proceedings in the Court are similar to national-level court proceedings, they might become relative only to a certain extent. This is determined by placing the decision-making process in the European international area, where the countries accused of human rights violation are in various ways obliged to respect the judgements of the ECtHR.

The decision-making process of the Convention system is carried out within the framework of a defensive mechanism, based on individual and inter-state (collective) complaints. However, individual complaints play the dominant role from the point of view of the system, because they allow an individual to commence proceedings against a state which does not recognize that there has been a violation of human rights (or at least the individual's perception is that there has been a violation). The relevance of individual complaint stems mainly from its substantive character. It empowers an individual in the international jurisdiction for human rights protection[28] and therefore, allows to level-set the position of an individual and a state during proceedings in the Court. Actually, individual complaints shape the European protection system, and it seems justified to call them the cornerstone of the protection system.[29] However, the relevance of the institution of individual complaint is also exposed through quantitative comparison due to the fact that each year there are over ten thousand of such applications, whereas there were only 19 inter-state applications submitted until 2000.[30] Such an enormous disproportion indicates a marginal importance of inter-state applications.

The decision-making process, at least when it comes to its initiation, is a consequence of the subsidiary character of the European system of human rights protection. An individual application is subject to examination if it is recognized as

[28] A. Redelbach, *Natura praw człowieka. Strasburskie standardy ich ochrony*, Toruń 2001, p. 95.

[29] B. Gronowska, *Pozycja jednostki w systemie procedury kontrolnej Europejskiej Konwencji Praw Człowieka z 1950 r.*, [in:] *Księga Jubileuszowa Prof. dra hab. Tadeusza Jasudowicza*, eds. M. Balcerzak, A. Czeczko-Durlak, Toruń 2004, p. 162.

[30] M. Jabłoński, S. Jarosz-Żukowska, *Prawa człowieka i systemy ich ochrony. Zarys wykładu*, Wrocław 2004, p. 245.

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admissible after fulfilling the admissibility criteria stated in art. 35 of the ECHR. The positive premises include the exhaustion of all the domestic remedies and observance of the period of six months to file a claim. The abovementioned article defines negative, formal and subjective obstacles that make it impossible for a claim to be examined by the ECtHR. The most important of the formal obstacles is that the case has already been submitted to another procedure of international investigation. The remaining obstacles include the anonymity of the complaining party and submission of a complaint that is substantially the same as a matter that has already been examined by the Court. Subjective obstacles include incompatibility of the application with the provisions of the Convention on human rights and freedoms, or a situation where the application is manifestly ill-founded, or there has been an abuse of the right of individual claims. One should also mention the new admissibility criterion of significant disadvantage, introduced by Protocol 14. It is a rather controversial criterion. On the one hand, it allows to declare less important applications inadmissible, which will allow the Court to examine difficult applications with greater care. On the other hand, the statement that the applicant has not suffered a significant disadvantage does not mean that there had been no violation of human rights. One could wonder whether it is not hypocrisy to establish a Court to shape European standards of human rights and their protection, while at the same time limiting the range of the protection only to the cases in which the applicant has suffered a significant disadvantage. This solution is harmful for those whose rights were violated, but their disadvantage was not significant. However, one should remember that this amendment was caused by the inefficiency of the control mechanism that was unable to deal with the growing number of applications, and the idea behind the reform was to increase the effectiveness of the ECtHR. The value of effectiveness was considered more important, especially when faced with a real threat of a complete collapse of the control mechanism.

All the admissibility criteria and the requirement to meet the criteria make it impossible to treat the Court as yet another court of appeal. Its function is to intervene in the domestic judiciary system if there is a violation of an individual's rights unnoticed by the competent authorities. It is not the aim of the ECtHR to replace national courts, which is why the exhaustion of domestic remedies is so important. This criterion imposes on an applicant the obligation to use all accessible measures that would allow domestic courts to take a stand on the allegation of infringement of the provisions of the ECHR.[31] At the same time, the state has the possibility to redress human rights infringements within its internal judicial authorities. Assuming ideal conditions of a national system that fully respects the

[31] H. Bajorek-Ziaja, *Skarga do Europejskiego Trybunału Praw Człowieka oraz skarga do Europejskiego Trybunału Sprawiedliwości*, 2. Edition, Warsaw 2008, p. 28.

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ECtHR standards, it should be assumed that individual applications against such a state would not even be submitted to the Court.

The current procedure assigns the authority in assessing the admissibility of an application to three judiciary bodies, which in fact means a single-judge formation, a Committee of three judges and a Chamber of seven judges.[32] Regardless of which particular body declares inadmissibility of an application, the decision is final and may not be challenged. A statement that "[…] over 90% of cases examined by the Court result in a declaration of inadmissibility"[33] gains importance only when contrasted with the fact that for a few years now the ECtHR has been rendering decisions in nearly 1,500 cases per year. This shows how the Court is overburdened with applications and how important the issue of admissibility examination actually is. It is difficult to say with all certainty why the Court receives so many manifestly ill-founded applications, especially if we bear in mind that submitting such an application requires compulsory representation by a lawyer. One could risk a hypothesis that many applicants consider Strasbourg to be yet another opportunity for an appeal. Unfortunately, this line of thought is completely faulty.

Declaring inadmissibility of an application may imply the beginning of proceedings in a Chamber, but it is not necessarily so in all cases, as all depends on the kind of infringement the ECtHR has to deal with. If the infringement is already the subject of a "well-established case law of the Court", then pursuant to art. 1, sec. 1(b), the Committee may declare an application admissible and, at the same time, render a judgment on the merits. The abovementioned procedure has four effects. First of all, it is supposed to speed up the examination and judgment in obvious cases that are the subject of well-established case law. Second of all, it is supposed to more effectively stimulate countries to abide by the standards that are so obvious that they are not subject to any discussion. Third of all, it reinforces the precedent nature of the judgments of the Court. Finally, it is supposed to give a Chamber more time to carefully examine the merits of difficult cases. If no decision is taken or no judgment is rendered by a Committee, the authority passes over to a Chamber. The main task of a Chamber is to carry out the proceedings and render a judgment which will determine whether a violation of human

[32] Articles 27, 28 and 29 of the ECHR define the appropriate sequence for declaring admissibility. The filtrating function is realized mostly by single judges. That was also the assumption of Protocol 14. What is characteristic is that a single judge may declare an application inadmissible or not inadmissible. This means that a single judge representing the ECtHR cannot declare an application admissible. If an application is not declared inadmissible then a Committee of three judges has to render its decision. If the Committee, under art. 28, cannot declare an application admissible, the decision is to be made by a Chamber.

[33] L. Garlicki (ed.), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności*, Vol. 2: *Komentarz do artykułów 19−59 oraz protokołów dodatkowych*, Warsaw 2011, p. 76.

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rights has occurred. The Court examines the merits of the case together with the representatives of the parties who present their positions in writing. It is a task of a Chamber to gather evidence and for this reason, if necessary, to conduct its own investigation. Hearings are the oral part of the proceedings held in public, unless the Court in exceptional circumstances decides otherwise, e.g. because of social norms, wellbeing of minors, protection of private life etc. The aim of the hearing is to determine facts which constitute a basis for further, legal stages of the decision-making process, and in consequence lead to rendering a judgment.

The decision-making process concerns the biggest body of the ECtHR, the Grand Chamber, as well. The Chamber carries out its judicial function in two cases. The first case is when a Chamber decides to relinquish jurisdiction in favour of the Grand Chamber. It happens when a Chamber is convinced that its resolution of a question might have a result inconsistent with the well-established judicial standard. Rendering such a judgment would create a threat of axiological destabilization of the system, which would be very inconvenient from the perspective of the countries that are required to respect certain standards. In such situations, a panel of 17 judges of the Grand Chamber are to be responsible for rendering a decision. In the second case the Grand Chamber examines the case in a quasi-appeal procedure, in which any party to the case may request a referral to the Grand Chamber within a period of three months from the date of the judgement (art. 43 ECHR). Such a request shall be accepted if the case presents a complex issue of general importance which causes difficulties affecting the interpretation or application of the ECHR. A panel of five judges of the Grand Chamber decides upon the level of complexity of the case. If the panel accepts the request, the Grand Chamber begins the decision-making process which results in a final judgment. The judgments of a Chamber may also become final if reference to the Grand Chamber has not been requested by any of the parties within three months after the date of the judgment. The Committee of Ministers is responsible for the supervision of the execution of a final judgment (art. 46, sec. 2 ECHR).

3.4. Reasoning and argumentation in the decision-making process of the law application

The universal principles of interpretation stated in the Vienna Convention on the Law of Treaties from 1969 (VCLT) constitute only a point of reference on which the ECtHR has founded its own interpretation rules that enable effective statutory interpretation of the general provisions of the Convention which take into consideration the developing social axiology and secure equal treatment of individuals irrespective of their nationality. The provisions of the VCLT which take the form of general rules of interpretation are only a starting point for the interpretative processes of the Convention and are insufficient. This is proved not

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only by the fact that the ECtHR has created its own specific interpretative rules, but also by the small number of cases in which the Court used the VCLT's rules for interpretation. M. Balcerzak conducted an enquiry as to the judicial decisions of the Court and came to a conclusion that between 1975 and 2008 the Court directly referred to the rules formulated in the Vienna Convention in only 35 cases.[34] It is an insignificant number, especially when compared to the number of judgments of the ECtHR, which has recently gone beyond 1,500 cases a year. This means that the subject of regulation – human rights – and the different subjective scope and characteristic normative structure of the ECtHR influenced the directions concerning statutory interpretation which were applied only to interpret the Convention, and which are now called specific directions.

The specific directions concerning statutory interpretation, including autonomous and evolutive interpretation, and to a certain extent the margin of the appreciation doctrine, are not only a supplement, but a necessary extension of the general rules of interpretation established by art. 31−31 of the Vienna Convention on the Law of Treaties. The ECtHR has shaped its own methods of ECHR's interpretation and it is extremely important to stress the aspect of necessity in this matter, because the analysis of judicial decisions provides arguments sufficient to pose a thesis on a mutual relationship between the application of specific doctrines and semantic decisions. Although these are not the only directions available, they still constitute a crucial element that determines the interpretation of a particular meaning for the specific ECHR provisions.

The process of creating an interpretative approach based on specific directions has its roots both in the characteristics of the Convention and outside of it. The reasons for that include:

1) The structure of the ECHR. Combining the rules of interpretative proceedings with the legislative structure of the Convention is obvious, due to the fact that a text is the subject of interpretation, and in the case of the Convention it is a specific text. The order of interpretative activities depends largely on the features of this text, among which we can mention clarity, precision of expression, high level of detail or the use of definitions that are open for semantic analysis.
2) The interpreting authority – the European Court of Human Rights. This factor becomes especially important in the normatively-institutional setting of the Council of Europe; probably even more important than in other legal systems. The importance of the Court results both from the responsibilities assigned to it by the ECHR in the decision-making process based on application of the ECHR provisions, and from the fact that the Court

[34] M. Balcerzak, *Zagadnienie precedensu w prawie międzynarodowym praw człowieka*, Toruń 2008, p. 175.

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is the only authority in Europe entitled to apply and interpret those provisions.

3) Human rights as the subject of interpretation. The Convention touches upon epistemological questions by forcing us to ask ourselves whether human rights actually exist, and upon ontological question, when we ask ourselves what those human rights are. This subject is especially prone to axiological and ideological analysis.
4) External conditions in which the Convention is applied. The constantly developing social relations and the changing economical and political environment certainly exert influence on how human rights and the limits of their protection are perceived. All of those factors definitely have an impact on the form of the specific technique of interpretation of the Convention. The form, i.e. specific directions, has drifted away from the traditional techniques.

The evolutive doctrine is based on a well-established and currently accepted notion that the Convention is a living instrument which must be interpreted according to the present day's conditions. This contestation was expressed directly in the judgment for the Tyrer v. UK[35] case. The adoption of such an approach was caused directly by the expressions in the ECHR that have significant axiological potential. If we stop for a moment and consider terms such as private and family life, correspondence, assembly, marriage, discrimination, or personal safety, we have to agree that their meaning and understanding has been evolving for the last decades; this fact did not slip the attention of the Court. The ECtHR's acceptance of evolution of such institutions as privacy or family makes it possible to classify the evolutive doctrine as a dynamic interpretation tool which enables us to adjust the meaning of terms to the changing reality of social, political and economic life.[36] However, the evolutive interpretation of the Court is something more than dynamic interpretation. Because of the fact that in many cases the text of the Convention includes only terms that have to be filled with meaning by the ECtHR, the judges are somewhat "sentenced" to activism – they have to create law through its interpretation. However, their freedom in this process is not unlimited. To the contrary: first of all, they have to observe the changing social relations, interpret them properly and create standards for protection. Second of all, they are limited by the VCLT and its provisions concerning interpretation in compliance with the subject and aim of the ECHR. Therefore, statutory interpretation is done strictly according to its functional directions. However, for the meaning to be in compliance with the subject and aim of the Convention, it has to be interpreted dynamically.[37] Con-

[35] Judgment Tyrer v. UK from 25 April 1978, case No. 5856/72, § 93.

[36] L. Morawski, *Zasady wykładni prawa*, Toruń 2006, p. 141.

[37] D.J. Harris, M. O'Boyle, C. Warbrick, *Law of the Convention on Human Rights*, Butterworths, London, Dublin, Edinburgh 1995, p. 7.

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sidering all this, it should be highlighted that the evolutive interpretation doctrine is aimed at determining the current meaning of definitions and may be, therefore, classified as functional, dynamically-oriented interpretation.

The necessity to attribute meanings to the terms from the ECHR that are independent from their national-level equivalents was one of the bases for the autonomous interpretation directions. The ECtHR shapes autonomous meanings of particular terms used in the Convention, thus creating a semantically independent grid of notions. This grid was established because of and for the purpose of creating a uniform understanding and application of the ECHR. Two dimensions may be attributed to the autonomous interpretation: the functional dimension and the justice dimension. The functional dimension enables the Court to become independent of the necessity to verify meanings that are attributed to particular terms in national legal systems. From the perspective of the economics of process, eliminating the need to verify the national definition of a given term, even if the semantic disparities are not significant, may allow the ECtHR to save considerable amounts of time. It is important due to the number of terms that are subject to autonomous interpretation, and due to the fact that they are legally relevant. These terms include: from art. 5 – "right", "detention", "other officer authorised by law to exercise judicial power", "person of unsound mind", "vagrant", "alcoholic", "a person spreading infectious diseases", "in accordance with the lawful arrest procedure"; from art. 6 – "court", "charged in a criminal case", "civil rights and obligations", "criminal", "witness"; from art. 7 – "punishment"; from art. 8 – "home", "correspondence"; from art. 11 – "association"; from art. 34 – "victim"; from art. 1 of Protocol No. 1 – "property"; from art. 1 of Protocol No. 7 – "expulsion". The Court verification of the material meaning of terms is not only aimed at a better efficiency of judgments. The rule of autonomous interpretation also has significant influence on harmonization of the national legal systems. At the same time, uniform understanding of the terms contributes to the establishment and maintenance of human rights protection standards.

The justice dimension is as important as the functional one. The autonomy of terms in the Convention is one of the guarantees for equal treatment of all citizens of the Council of Europe. Undoubtedly, a definition may influence the scope of guarantees for human rights protection. Various or even conflicting definitions of terms may cause variations in terms of human rights protection in particular countries, and thus lead to discrimination. The ECtHR could not approve of such a situation. To avoid this possibility, the rules of autonomous interpretation have been formulated.

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4. THE LEGAL ORDER OF THE EUROPEAN SOCIAL CHARTER

4.1. Systemic issues

The European Social Charter (further referred to as the ESC or the Charter) was signed in Turin on 18 October 1961 and on that same day it became open for signature to the European countries that expressed the will to become a party to this international agreement. According to art. 35 of the ESC the required number of five ratifications was accomplished in 1965. Thirty days after the submission of the last instrument of ratification, on 26 February 1965, the Charter came into force.[38] In the European legal area of the Council of Europe, the ESC serves as a supplement to the Convention. Unlike the ECHR which focuses on private and political rights, the Charter concentrates on rights that are "more difficult" to protect, so-called second-generation human rights that include social and economic rights. The main differences between this subsystem and the ECHR subsystem may be seen in the character of rights that are protected by the Charter, more specifically, in the scope of real guarantees given by the European countries.

The legal character of the obligations that ensue from the European Social Charter (which will be analysed in detail in the next part of this article) implies two main systemic consequences that also have significant influence on the decision-making process and the shape of the control mechanism. First of all, entering the ESC is not functionally combined with the membership in the Council of Europe. This is a major difference in comparison to the situation where becoming a member of the Council of Europe depended on the simultaneous ratification of the ECHR.[39] Some say that the ESC does not have the same political support as the ECHR.[40] It is true to some extent, because political support for the ideas of the Charter is determined by the pragmatism of the countries which want to assess

[38] 27 countries are parties to the European Social Charter, including Poland which ratified the Charter on 25 June 1997. The Charter came into force in Poland on 25 July 1997. It is worth mentioning that on 3 May 1996 the Revised European Social Charter was adopted and opened for signature. It came into force on 1 July 1999. The revised Charter includes an extended array of obligations. Due to the extended scope of protection the Revised Charter is expected to further develop and replace the ESC. Currently both Charters coexist and both are binding. Poland signed the Revised Charter on 25 October 2005. However, until this day the Revised Charter remains unratified. As a result, the European Social Charter is the only document analysed in this article.

[39] At the beginning the membership in the Council of Europe did not depend on the ratification of the Convention due to a statement in the first sentence of art. 59 sec. 1 reading "(membership) shall be open to the signature of the members of the Council of Europe". At the end of the 1980s the political structure of the Council of Europe changed and those two elements (membership in the CE and ratification of the ECHR) became strictly tied. Cf. *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności*, Vol. II: *Komentarz do artykułów 19–59 oraz Protokołów dodatkowych*, ed. L. Garlicki, Warsaw 2011, p. 455.

[40] B. Banaszak, A. Bisztyga, K. Complak, M. Jabłoński, R. Wieruszewski, K. Wójtowicz, *System ochrony praw człowieka*, Zakamycze 2003, p. 141.

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their real abilities to fulfil the obligations arising from ratification of the ESC. Therefore, entering the ESC is about making a well thought-out and politically conditioned decision whose current number in Europe is limited. It is even more difficult to imagine a growing number of ratifications, especially in the face of the growing economic crisis. It seems that a reverse tendency will be visible, i.e. the countries that already are parties to the Charter will find it increasingly more difficult to fulfil their obligations as to guaranteeing the social and economic rights resulting from the Charter, especially in the times of the economic downturn and the disadvantageous financial situation. Most countries are aware of the fact that the dynamic economic situation may make an effective fulfilment of the obligations impossible. This is the reason for the cold calculation implemented by the countries while assessing their real abilities to fulfil the obligations. In the context of the entire system, making the membership dependent on becoming a party to the ESC would significantly limit the subjective scope of the Council of Europe, which at this moment is a European organization that has a European-global nature. If such a dependency were to be introduced, the situation would be ridiculous: the countries that are only parties to the ECHR would be left outside of the Council of Europe while fulfilling one of its main goals: respect for human rights and freedoms.

The second consequence is the process of accession to the Charter which is still ongoing as evidenced by 44 ratifications[41] out of the 47 member states of the Council of Europe.[42] It is very likely that the process of ratification of the ESC will be discontinued due to the newer formula of the RESC, and the practice of resignation from the ESC and ratification of the RESC has already been observed. This is why the process of ratification has slowed down.

Paradixically however, due to the structure of commitments resulting from the RESC (as the revised Charter guarantees a higher standard of social and economic rights as well as 2. generation rights) and due to the current economic downturn in Europe, the status of party to the ESC will be more easily acceptable than the status of the RESC (as the RESC guarantees a more extensive body of rights). As of today, 14 countries have not yet ratified the revised Charter although as many as 12 countries have signed the RESC (and withheld its ratification).

4.2. The legal character of the obligations arising from the European Social Charter

Stating the legal character of the obligations arising from the ESC is crucial if one wants to understand the decision-making process carried out on the basis of a subjective international agreement, and significant differences between this

[41] See: *ibidem*.

[42] Data as of March 26, 2013 (http:/coe.int/t/dghl/monitoring/social charter/Presentation/).

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approach and the classic approach towards the application of law understood as a decision-making process based on the competence of a particular subject to make individual and specific decisions.[43] The decision-making process understood within the framework of the ESC does not fit in this definition. Understanding those differences is possible after the analysis of the Charter's character and the characteristics of rights i.e. guarantees.

The European Social Charter is an international agreement that is closed for the countries which are not members of the Council of Europe. This fact does not actually influence the decision-making process. However, it does confirm the opinion that it may be a result of the inability to fulfil the second-generation rights standards by all the European countries. It should be highlighted that if we take into consideration the criterion of openness, the ECS is a typical agreement, because, as F. Benoit-Rohmer and H. Klebes put it, in the Council of Europe which is facing the tendency towards "opening the treaties" only 12 of the treaties are currently open to third parties.[44]

However, to understand the characteristics and the decision-making process of the ESC, it is crucial to understand the legal character of the obligations arising from it. The normative structure of the Charter makes it possible to distinguish a preamble and five following parts of the text, out of which the first one is an implicit declaration of objectives, while the rest expresses the objectives explicitly, by stating the substantive, political and procedural provisions. The appendix to the Charter is also a part thereof, pursuant to art. 38. The Charter is supplemented with three additional protocols that expand the catalogue of substantive rights.[45] The characteristics of ECS' substantive provisions is reduced to the options for each country as to what scope of obligations they want to assume from an array of the rights stated in the Charter. Each country has to assume five out of seven rights which are treated as the co-called "hard-core" provisions of the Charter.[46] Pursuant to art. 20, sec. 1(c) of the ESC, out of the rest of the rights referred to as "soft" provisions, a country has to select a number of articles leading the total number of articles by which a country is bound: no fewer than 10 articles of the 45 numbered paragraphs. This solution means that when it comes to law and obligations, each country may be in a different position. Regardless of the fact that the

[43] More: A. Korybski, *Application of law as an object of study: key concepts, issues and research approaches*, in this volume, pp. 13–25.

[44] F. Benoit-Rohmer, H. Klebes, *op. cit*., pp. 104–105.

[45] Additional protocol to the ESC from 5 May 1988. 13 countries are parties to this protocol (it came into force on 4 September 1992). Poland is not a party to this protocol.

[46] Pursuant to art. 20 sec. 1(b) the hard-core rights of the ESC are: art. 1 – right to an occupation; art. 5 – right to freedom of association; art. 6 – right to bargain collectively; art. 12 – right to social security; art. 13 – right to social and medical assistance; art. 16 – the family right to appropriate social, legal and economic protection; art. 19 – migrant workers and their families have the right to protection and assistance.

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Charter grants the right to select articles and therefore the scope of obligations by which a country will be bound, in the assessment of many countries in the Council of Europe the threshold is still too high to allow them to become a party to this international agreement. This is, of course, connected with the character of the rights provided in the ESC. C. Mik writes about their character stating that "[…] although they regulate human rights, they do not undergo objectification".[47] This statement is true, which is confirmed by each of the 19 articles of Part 2 of the Charter. Each of these regulations includes the statement "With a view to ensure the effective exercise of the right […], the Contracting Parties undertake". After this statement the aims (art. 1(1) – to accept as one of their (the Contracting Parties to the ESC) primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment), tasks (art. 3(1) – to issue safety health regulations), and assurances (art. 3(2) – to provide for public holidays with pay) that a country is bound to realise are presented in detail. In fact the ESC provisions are about a country's obligations and not about subjective human rights to which an individual is unconditionally entitled. The regulations in Part 2 of the Charter are not strictly formulated. They do not state the requirement for immediate realisation and in many cases they only constitute a programme with many, sometimes undefined, conditions. This is exemplified by art. 2(1) which states that the countries undertake "to provide for reasonable daily/weekly working hours and the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit". The way in which the second-generation rights are stated in the Charter makes them subjective and not objective. This feature makes it impossible for an individual to effectively pursue his or her rights, regardless of how the protection mechanism functions. Of course, the creators of the Charter were aware of that, and established a control mechanism suitable for the normative structure of the provisions, based not on an individual complaint, but on a procedure of audit of states. It is more of a monitoring tool and uses gentle influence rather than repressive measures against countries that violate the provisions of the ESC.

4.3. The decision-making process

The decision-making process carried out within the framework of the ECS control mechanism in not exactly a process of the application of law in the meaning that is presented in this article. However it has, in principle, the character of a decision-making process. Everything depends on assuming a certain terminological convention. If we assume that the application of law should be understood

[47] C. Mik, *Koncepcja normatywna prawa europejskiego prawa praw człowieka*, Toruń 1994, p. 203.

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as a decision-making process carried out by a competent body in order to issue a specific and individual decision on the basis of which the allocation of rights and obligations is done, then the ESC control mechanism extends beyond that understanding of the process of the application of law. The decision-making process carried out within the framework of the ESC control mechanism has different character.

First of all it should be noted that the control mechanism was adjusted to the character of rights provided in the Charter. Moreover, one of the main bodies that determine the structure of the mechanism – the Committee of Independent Experts (CIE)[48] – is not a judicial body. Seemingly, it was assumed that the control is not supposed to and does not have the character of court proceedings. This has significant influence on the shape of that mechanism which is rather based on reporting and recommendation. The procedure includes the following stages:

1) Every two years each Contracting Party of the ECS has to prepare a report on the realisation of obligations which ensue from the Charter. The reports are submitted to the Secretary General of the Council of Europe.
2) Then the Committee of Independent Experts examines the reports to verify how the country fulfils its obligations, and draws up a report containing its conclusions.
3) The next step is the political analysis of the CIE carried out by the Governmental Committee (GC) which draws up its own report for the Committee of Ministers of the Council of Europe.
4) On the basis of the report of the GC, the Committee of Ministers adopts a resolution containing individual recommendations to the countries concerned.

The aim of the control mechanism is to assess how the Contracting Parties fulfil their obligations arising from the ESC. It is not supposed to be a way for individuals to pursue rights, which the country is bound to guarantee. The Committee of Independent Experts which draws up the conclusion is a quasi-judicial body. It carries out its proceedings by correspondence and the conclusion is not legally binding, although it is sometimes called a decision and the Committee calls it "case-law".[49] Formally, the conclusion of the Committee is not a decision in the process of the application of law. It is rather an opinion that constitutes the basis for assessment of the Governmental Committee and re-assessment carried out by

[48] Committee of Independent Experts was established pursuant to art. 25 of the Protocol of 21 October 1991 (procedural changes) which reformed the mechanism of abiding by the ESC. Pursuant to this article the The Committee should have at least 9 member selected by the Parliamentary Assembly of the Council of Europe. Currently the judges are selected by the Committee of Ministers, which decided upon the number of 15 judges.

[49] This mode of referring to the Committe is described by A. Bisztyga in comment 71 to chapter 4 [in:] B. Banaszak, A. Bisztyga, K. Complak, M. Jabłoński, R. Wieruszewski, K. Wójtowicz, *op. cit*., p. 143.

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the Committee of Ministers that takes the form of a recommendation. The Committee of Ministers formulates recommendations if it finds out that a country is not fulfilling its obligations arising from the ESC. In this procedure it is important that the Committee of Ministers recommends undertaking particular measures aimed at fulfilling the obligations, and does not demand their application. It seems that the Committee cannot demand their application for many reasons, not only because due to their legal character, the recommendations have no binding power. The rights stated in the ECS are mostly structured obligations of the countries that those countries should realise and guarantee their citizens as far as it is reasonably possible in as short an amount of time as possible. Taking that into consideration it seems almost illogical to sanction those countries for their inability to implement the obligations.

The recommendation of the CIE has an individual character since it is aimed at a particular Contracting Party. It is also specific, because measures that a country should undertake to improve their position are included in the recommendation's content. Although the recommendation is individual and specific, it is not a typical decision on the application of law, and not only due to the lack of binding power. As to the merits this decision does not concern the entitled entity – an individual whose rights resulting from the ESC should be guaranteed. An individual is not entitled to submit an individual complaint, because the ESC rights are not objective and not immediately due. The control of the process of their realisation is therefore carried out with the exception of the interested individual. In fact, there are two aims of the ESC control mechanism. The first is to constantly monitor measures that the countries undertake to achieve the standards stated in the ESC. The second, a direct consequence of the first one, is to give countries suggestions concerning particular measures and their strengthening in a situation when achieving the standards stated in the ESC is obstructed. The control mechanism is aimed at long-term measures which, after some time, should lead to the achievement of the rights guaranteed in the Charter.

4.4. Reasoning and argumentation in the decision-making process of the application of law

The decision-making process consists of consecutive stages. In each of the stages various measures are undertaken and various types of reasoning are implemented. Their ultimate goal is to issue a decision on the application of law. Although each of those stages is very important, statutory interpretation, and especially reasoning and argumentation used at this stage of the application of law, constitute the central point of every decision-making process. Statutory interpretation results in establishing a norm which is crucial for binding determination of facts and legal consequences in the form of decisions on the application of law. L. Leszczyński writes: "the content of the decision on the application of law

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contains the determination of the actual state of affairs from the perspective of the sanctioned legal norm and determines the legal consequences of this determination from the perspective of the binding sanctioning norm"[50]. This decision is isolated, due to the fact that it individualises the addressee, and specific, because it states his or her behaviour precisely. The decision on the application of law should in principle answer the question whether the norm has been infringed or not, whether the addressee of the norm infringed the law, and finally whether the subjective rights of the addressee of the decision were infringed.

The decision-making process understood in this way is not present within the framework of the ECS control mechanism. As stated before, the ECS control mechanism is based on reporting and recommendation. Its aim is to determine whether a country fulfils its goals and objectives to which it is bound by the ESC. The ESC obligations are not legally binding. Therefore, one cannot treat them as substantive human rights, the infringement of which would constitute a basis for asserting claims by means of judicial proceedings. For these reasons the decision-making process differs significantly from the traditional understanding of the application of law. As a consequence, reasoning and argumentation applied in such a decision-making process realised within the framework of the ESC are limited and restricted. There is no stage at which one would determine the actual state of affairs. The validation phase which is devoted to the verification of the legal status is limited only to the determination whether a country has undertaken legislative measures to fulfil the obligations arising from the Charter. It seems that at this stage functional arguments are of great importance. The countries are not required to fulfil their obligations. Therefore, the control mechanism does not include the reasoning from the stage of subsumption interpretation or the decisions concerning an individualised entity, in this case – a natural person. The decision, in the form of conclusions of the Committee of Independent Experts, has the character of a non-binding opinion issued by a quasi-judicial body. At most, it may constitute a basis for recommendations formulated by the Committee of Ministers. These recommendations are aimed at countries which, in the Committee's assessment, do not fulfil the obligations arising from the ESC.

5. CONCLUSIONS

The application of law in the legal order of the Council of Europe is an issue which demonstrates the decision-making processes concerning human rights protection within the framework of the regional-European system of human rights protection. Establishing a supranational control within this order had significant

[50] L. Leszczyński, *Zagadnienia teorii stosowania prawa. Doktryna i tezy orzecznictwa*, Zakamycze 2004, p. 17.

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influence on the modification of the decision-making process of the application of law in comparison to a process which was only carried out in a domestic legal area. The consequences of being a member of the Council of Europe concern mostly human rights protection realised on the basis of the ECHR. This convention constitutes the core of the legal order. As regards the decision-making dimension, the consequences for the Contracting Parties to the Convention are as follows. First of all, the establishment of the institution of individual complaint has empowered individuals. This inspired the European Court of Human Rights to initiate a process of control over national-level decisions. Therefore, the principle of subsidiarity was used to elevate the control to supranational level. Second of all, the ECHR ratification makes a country fall automatically under the Court's jurisdiction. The decisions of the Court are to be executed within the domestic legal order of each country. Third of all, all of the ECtHR decisions (not only those issued against a country) shape the standards of European human rights protection that should be implemented in all the countries of the Council of Europe. The implementation of those standards should influence the legislative processes of rulemaking carried out by the legislature and affect the application of law. The national courts (in the judicial type of the application of law) and administrative bodies (in the managerial type of application of law) should consider the Convention to be a validating argument. On a national level, the judicial standards of the ECtHR should be considered to be interpretative arguments applied in the decision-making process of the application of law. The European Social Charter supplements the legal order of the Council of Europe. Due to the fact that the Charter guarantees second-generation rights, the control mechanism established on its basis has a different legal character. It does not have a judicial character and does not trigger a direct need to implement the decisions made by the auditing bodies. The aim of the control body is to prompt the countries to strive in their national laws for better and more effective safeguarding of the rights arising from the ESC.

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SUMMARY

In the present article, model-based features of the decision-making process of the application of law in the legal order of the Council of Europe have been presented. Neither the real assessment of the effectiveness of legal order nor the way in which Poland realises its obligations arising from the membership in the Council of Europe have been analysed, as such an analysis would require a separate and completely different examination. Referring the application of law in the legal order of the

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Council of Europe the guidelines for the decision-making process of the application of law applied in the legal area of the European Convention on Human Rights and the European Social Charter were presented. Problems of the characteristics of the decision-making process of the application of law in terms of human rights protection on European and supranational level were discussed, as well as the differences between such processes carried out on the basis of the ECHR and the ESC. The demonstration of these processes requires a presentation of the relevant background in the form of a general overview of the Council of Europe in terms of human rights protection in Europe (the first part of the article). In later parts of the article, the following issues were analysed and discussed in details: systemic consequences associated with becoming a party to the Convention and to the Charter, the character of the obligations arising from the membership, the decision-making process and the reasoning applied within the process.

STRESZCZENIE

Niniejszy artykuł został poświęcony problematyce stosowania prawa w porządku Rady Europy. Przedstawia on założenia procesu decyzyjnego stosowania prawa realizowanego w obszarze prawnym Europejskiej Konwencji Praw Człowieka i Europejskiej Kary Społecznej. Zamierzonym celem artykułu było pokazanie specyfiki procesu decyzyjnego stosowania prawa w przedmiocie ochrony praw człowieka na europejskim poziomie ponadnarodowym, ze szczególnym uwzględnieniem różnic tego procesu, realizowanego na podstawie EKPC i EKS. Ich pokazanie wymagało przedstawienia ogólnej charakterystyki Rady Europy i jej aktywności w obszarze europejskiej ochrony praw człowieka. Następnie w ramach zagadnień szczegółowych analizie poddano: sądowy mechanizm kontrolny poszanowania praw człowieka przez państwa, inicjowany na podstawie skargi indywidualnej, realizowany przez Europejski Trybunał Praw Człowieka w ramach typu sądowego stosowania prawa; pozasądowy mechanizm kontrolny, realizowany przez Komitet Niezależnych Ekspertów, którego istotą jest ocena realizowania przez państwa-strony zobowiązań z EKS, a nie dochodzenie przez podmioty indywidualne praw z karty, do których gwarantowania państwo się zobowiązało. Te dwa zdecydowanie odmienne prawnie mechanizmy kontrolne wyznaczane są jako systemowe konsekwencje dla państw, związane z przystąpieniem do EKPC i EKS, charakterem zobowiązań z nich wynikających oraz możliwością ich gwarantowania i dochodzenia na drodze prawnej przez jednostki. W sposób zasadniczy wpływają one na przebieg procesu decyzyjnego stosowania prawa w porządku Rady Europy i rodzaje rozumowań wykorzystywanych w ramach tych procesów.