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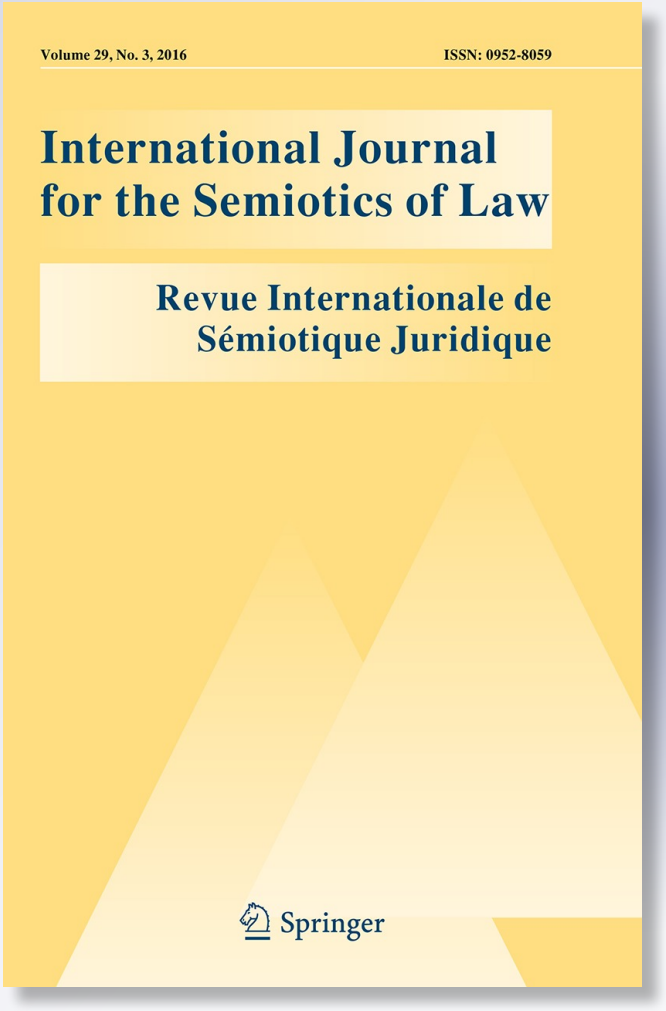

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Judges as Readers, Authors and Dialecticians: Legal Interpretation in the EC*t*HR Cases on Mental Disability

Anita Soboleva[1]

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Abstract The wording of major human rights texts—constitutions and international treaties—is very similar in those provisions, which guarantee everyone the right to family, privacy, protection against discrimination and arbitrary detention, and the right to access the court. However, judges of lower national courts, constitutional judges and judges of the European Court of Human Rights often read the same or seemingly the same texts differently. This difference in interpretation gives rise not only to disputes about the hierarchy of interpretative authorities, but to more general disputes about limits of judicial construction and validity of legal arguments. How it may happen, that the national courts, which apply constitutional provisions or provisions of national legislative acts, which are seemingly in compliance with the international human rights standards, come to different results with the international judges? Do they employ different interpretative techniques, share different values or develop different legal concepts? Do international judges 'write' rather than 'read' the text of the Convention? Who is, in Plato's terms, a name-giver and who has a power to define the 'correctness' of names? The answers to these questions from the rhetorical and semiotic perspectives are exemplified by the texts of the judicial decisions on the rights of persons with mental disabilities.

Keywords Semiotics of law · Legal rhetoric · Legal interpretation · European Court of Human Rights · Plato · Judges · Rights of persons with mental disabilities · Judicial decision-making · Construction of meaning · Legal arguments

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1 Introduction

The wording of major human rights texts—national constitutions and international conventions—is very similar in provisions, which guarantee such basic rights as the rights to family, privacy, protection against discrimination and arbitrary detention, the right to fair trial and access the court. However, judges of ordinary national courts, constitutional judges and judges of the European Court of Human Rights (the EC*t*HR) often read the same or seemingly the same texts differently. For instance, the EC*t*HR in adjudicating the cases, involving the rights of mentally disabled persons, 'reads' the national legislation in a manner, which has extended the rights of incapacitated persons far beyond the national laws and well-established judicial practice of the member states. A question may arise, whether the international judges extend the existing fundamental human rights to a new group, whose members have been traditionally deprived of the possibility to realize them in person, or turn into the 'authors' of new legal rules, which had not been written in the original text of the European Convention on Human Rights and Fundamental Freedoms? In any case, the decisions of the EC*t*HR's judges had not been predictable for the national judges, who used to read the text of the Convention in the light of their own national legislation and domestic legal concepts of capability, which routinely justify restrictions on the rights of the incapacitated.

While national judges seek to defend a wide 'margin of appreciation' for the national authorities and tend to construe the text of the Convention narrowly, in the light of the national jurisprudence, the EC*t*HR does not feel bound by the long-existing national legal concepts and approaches. In the field of rights for mentally disabled persons it created in the last decades a new legal landscape for the whole Europe.

To exemplify the thesis, I will analyze those cases from the EC*t*HR jurisprudence, which guarantee the rights to liberty and security of person, the right to fair trial and the right to marry. I will argue that in the human rights discourse national judges in Europe are more inclined to act as 'readers' of human rights texts, while judges of the EC*t*HR can also turn into 'authors' of new legal concepts, which they are developing through cross-referencing and cross-fertilization of different legal cultures, or into 'dialecticians', when they go beyond the generally excepted application of the existing legal rules, looking into the substance of the words and legal concepts rather than into the meaning assigned to these rules in legal practice. They form new patterns of behavior for governments and their agencies by reading the articles of the Convention and national laws in a semiotic-pragmatic way. As a result, in last decades a 'margin of appreciation' left for the national states in interpretation of human rights provisions has been shrinking, while the process of globalization of European values has been intensified.

2 Authors v. Readers and Name-Givers v. Name-Users

Rhetorical method describes a reasoning process in terms of 'speech (content, discourse, text)', 'author (rhetor)' and 'audience (reader, listener)' [1]. ChaÏm Perelman and L.Olbrechts-tyteca, "for reasons of technical convenience, and in order not to lose sight of the essential role played by the audience when we use the terms 'discourse', 'speaker' and 'audience'", suggested to understand by them, "respectively, the argumentation, the one who presents the argument, and those to whom it is addressed" [5: 7]. The notion of *audience*, borrowed from the classical rhetoric, became crucial for the theory of legal argumentation, because, as Perelman and Olbrechts-tyteca fairly stated, "every speech is addressed to an audience" and the author must bear in mind that "his text is always conditioned, whether consciously or unconsciously, by those persons he wishes to address" [5:7].

Legal texts, including national legislation, international conventions and judicial opinions, as any other texts can be also described in these rhetorical terms, where, in a simplified approach, legislators or drafters of the conventions would be considered as a collective 'author', a piece of legislation as 'speech' and law-implementers (judges, executive bodies, law practitioners) as 'audience'. However, examination of judicial opinions as narrative and rhetoric shows that correlation between the notions of 'author', 'reader' and 'speech' as applied to legal reasoning is not that simple.

First of all, we need to decide, who is included in 'reader': a law implementing body, a judge, a client, a legal scholar, a law student, anyone who may be affected by a legislative act or a judicial decision, which is grounded in this act, some of these actors or all of them? Dennis Kurzon, for example, notes, that both authors and readers of the legislation are lawyers—a judge is a reader of the legislative text, created by an author (legislator) [4: 280]. Thus, he restricts the audience to the judges. Debora Cao takes a different way to look at the 'audience', or 'addressee'. She extends the notion of the audience—in her theory "the judiciary can be regarded as one addressee of the collective addressees of legislation", because the audience includes also the ordinary people (clients), to whom a former reader (a judge) conveys the meaning of a legislative text, created by an author (legislator). Conveying the meaning of the legislative text through the text of judicial decision, in her opinion, creates "a different type of speech act", in which the judge turns into the addresser. Thus, "in democratic discursive lawmaking, the addressee may also become an addresser" [2: 7].[1]

Secondly, it is not quite clear, who may be treated as 'author'. It seems that the term 'addresser' (or 'law-taker, 'sender') from the speech acts theory and legal communication theory[2] cannot be regarded as a full synonym of the rhetorical term 'author/rhetor', because the rhetorical 'author' is not just a person, who delivers a

[1] See also about legislative addresser and addressee her *Chinese Law: A Language Perspective*. Aldershot, Ashgate, 2004.

[2] For description of different models of legal communication, see Hanneke van Schooten. 1999. *Instrumental Legislation and Communication Theories*. In: Semiotics and Legislation: Jurisprudential, Institutional and Sociological Perspectives by Hanneke van Schooten (ed.). Deborah Charles Publications, Leverpool, 1999, pp. 183–211.

speech and conveys the meaning, but also a person, who 'invents' the speech, its topic, main proposition and arguments. A judge is definitely an author of the text of the judicial decision, but in certain cases she may also become an author or co-author of a legal rule—when under the mask of legal interpretation of the existing legislative provision she creates new obligations or new responsibilities for a state or a person. In some cases it is difficult to define, whether the judge acted as a creative reader or as an author. If we consider the legislator as a sole legitimate 'author' ('law-giver'), who has been invested with a power to make law, and a judge as a passive 'reader' ('law-taker'), who has been invested with a power to find the statute's original meaning (that is the meaning which the author had an intent to convey), then we speak about interpretation in law in hermeneutic terms, and the whole process of interpretation can be described as *a process of the search for meaning* of the legislative text. However, when we deal with cases, which raise collisions between national law and international standards, in which international judges are often forced to be pro-active in their decision-making, then the meaning is rather constructed than searched, and the international judge becomes an 'author' of the rule for the national judges and national legislators. The most vivid examples that provoked serious discussions on national level in a number of the Council of Europe member states are the judicially constructed right to vote for prisoners,[3] the right to freedom of assembly for LGBT[4] and the right to marry for persons with mental disabilities.[5] The national law-makers and judges tried to challenge the 'authorship' of their international colleagues by claiming that they had overstepped the boundaries of their powers (see, for example, the article by the Chief Justice of the Russian Constitutional Court Valerij Zorkin "Limit of Flexibility" [9] or the statement made by then the UK Prime Minister Tony Blair in the House of Commons immediately following the *Hirst* judgment in 2005[6]).

Thirdly, the rhetoric of judicial opinions differs from that of legislative texts, because it includes story-telling: statement of facts, summary of the submissions of the parties with their interpretation of facts and applicable legal rules, arguments pro and contra and reasoning of the adjudicating body. Parties try to convince a judge, the judge tries to obtain consent of the upper judges and adherence of the parties and

[3] *Hirst v. the United Kingdom* (no. 2), application No 74025/01, Grand Chamber Judgment of 6 October 2005; Greens and M.T. v. the United Kingdom, applications No 60041/08 and 60054/08. Judgment of 23 November 2010.

[4] *Bączkowski and Others v. Poland*, application no.1543/06, Judgment of 3 May 2007; *Alekseev v. Russia,* Applications nos. 4916/07, 25924/08 and 14599/09, Judgment of 21 October 2010. *Lashin v. Russia*, application no. 33117/02, Judgment of 22 January 2013.

[5] *Lashin v. Russia*, application no. 33117/02, Judgment of 22 January 2013.

[6] "The current position in law is that convicted prisoners are not able to vote, and that will remain the position under this Government." On 10 February 2011, the following motion was debated in the House of Commons and agreed on by 234 votes to 22: "That this House notes the ruling of the European Court of Human Rights in *Hirst v United Kingdom* in which it held that there had been no substantive debate by members of the legislature on the continued justification for maintaining a general restriction on the right of prisoners to vote; acknowledges the treaty obligations of the UK; is of the opinion that legislative decisions of this nature should be a matter for democratically-elected lawmakers; and supports the current situation in which no sentenced prisoner is able to vote except those imprisoned for contempt, default or on remand." Prisoner Voting and the Human Rights in the UK. Human Rights Futures Project, LSE, June 2013. http://www.lse.ac.uk/humanRights/articlesAndTranscripts/2013/PrisonerVotes.pdf.

general public to what she says in her decision. As Paul Gewirtz stated, "treating law as narrative and rhetoric means looking at facts more than rules, forms as much as substance, the language used as much as the idea expressed… It means examining not simply how law is found but how it is made, not simply what judges command but how the commands are constructed and framed. It understands legal decision-making as transactional—as not just a directive but an activity involving audiences as well as sovereign law givers… It sees laws as artifacts that reveal a culture, not just policies that shape the culture. And because its focus is story as much as rule, it encourages awareness of the particular human lives that are the subjects or objects of the law, even when that particularity is subordinated to the generalizing impulses of legal regulation" [9: 3].

Different judges may read the same legislative text differently because they hear different stories, or because they hear the same story differently, or because they evaluate differently the facts from the standpoint of justice and fairness. In the last case it may be said, that they create their own story of the case they have to resolve.

In analyzing new interpretations of rights, I would also try to benefit from the ideas, which were developed by Plato in his famous dialogue "Cratylus" [6] about name-giving and assessment of the 'correctness of names'. According to Plato, a name needs to be properly made to do its job. To secure the 'correctness' of the name, there is a separation of roles between a name-giver, who is called the 'lawmaker' or 'nomothetēs', and a name-user, or a lawmaker's overseer, who is called the 'dialectician' [7: §388c–390e]. A lawmaker (who is in Plato's terms not a legislator in modern understanding of this word, but a craftsman, who assigns names to things) practices legislative art as a specialists in name-design, "while understanding of the objects named, if available at all, is the province of his natural overseer, the dialectician",—comments David Sedley on Plato's idea [8: 9]. In Part III of *Cratylus*, as David Sedley notes, "Socrates shows that, however well a name may describe, it is likely to be less than a prefect description of its nominatum, and linguistic convention must play some part. He goes on to argue that names are not a secure route to the truth about their nominata (a) because the name-maker may not have known the truth, (b) because they do not tell as coherent a story as Cratylus hoped. Rather than channel our inquiries through names, we should directly investigate the things themselves" [8: 5]. In the light of Platos' concept, we can consider the provisions of the national laws and international treaties as 'names', which are assigned to some things or values existing in the natural world, and the international judges of the EC*t*HR as 'overseers' of the provisions, created by the name-givers (drafters of the national constitutions, human rights acts or the European Convention), that are as dialecticians, who fill the names with their true, correct meaning, corresponding the nature of justice. Thus the 'reader' becomes the 'co-author', who corrects the meaning of the legal provision, which remains unchanged in its wording.

In order to check, if this thesis is valid also for the national judges, I will compare the approaches of the national and international judges to decision-making in cases, involving the rights of persons with mental disabilities to liberty and security of person, to access the court, to marry, to enjoy private and family life without being discriminated. In order to better understand the roles assigned to national judges and

the judges of the EC*t*HR, the doctrine of 'margin of appreciation' should be taken into account.

3 Article 14 of the European Convention on Human Rights and 'Margin of Appreciation'

Article 14 of the ECHR guarantees the enjoyment of the rights and freedoms set forth in the Convention "without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." Two comments should be made here. First one is that the article does not contain the restrictions clause—this means that no exemptions from the right to non-discrimination exist for any group of people in the access to rights, proclaimed by the Convention and its Protocols. However, persons from a number of disadvantaged groups—just by reason of belonging to these groups—in many countries of Europe have been traditionally deprived of the rights which all other individuals enjoyed. This is true, for instance, in respect of the rights of persons with mental disabilities, gays and lesbians, prisoners and ethnic minorities. The second comment is that the list of the protected grounds is not exhaustive and thus leaves space for disputes, if the drafters (name-givers) of the Convention and relevant provisions of national constitutions and human rights acts had in mind that 'other status' would include disability and sexual orientation that had not been contemplated at the time when the Convention had come into force. For instance, in *L. and V. v. Austria*[7] and in *Salgueiro da Silva Mouta v. Portugal*[8] the EC*t*HR constructed sexual orientation as a protected ground under Article 14; in 2008 in *E.B. v. France*[9] it made a shift in its own approach to construction of the right of homosexuals to adopt children (as distinct from its own decision in *Fretté v. France* in 2002[10]). As a result, homosexuals received protection from discrimination which they had not previously enjoyed, but the governments of the responding states insisted in their submissions that it was not for the international judges to go that far in their interpretation of the right to private and family life.

The doctrine of 'margin of appreciation' has been developed by the EC*t*HR in its interpretation of the 'necessity in a democratic society' clause, that was initially mentioned in Sections 2 of Articles 8, 9, 10, and 11 of the EC*t*HR, which stated that the right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association shall be subject only to such limitations as are necessary in a democratic society. Later 'necessity' clause appeared in a number of articles of Protocols to the Convention (for instance, in Article 2 of Protocol 2—freedom of movement, Article 2 of Protocol 7—equality between spouses).

[7] *L. and V. v. Austria*, applications nos. 39392/98 and 39829/90, Judgment of 9 January 2003.

[8] *Salgueiro* da Silva Mouta v. Portugal, application no. 33290/96, Judgment of 21 December 1999.

[9] *E.B. v. France*, application no. 43546/02, Grand Chamber Judgment of 22 January 2008.

[10] *Fretté v. France*, application no. 36515/97, Judgment of 26 February 2002.

In trying to define, what is necessary in a democratic society, the EC*t*HR used a presumption, that 'necessity' can be understood differently in the context of different states and cultures and that national authorities are left a certain 'margin of appreciation' in assessing whether such a need exist:

> "the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights"; "[b]y reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion… on the "necessity" of a "restriction"…" ("*Belgian Linguistic*"[11] *case*, para. 10).

The Court also noted, that

> [t]he Court's task in exercising its supervisory function is not to take the place of the national authorities, but rather to review…, in the light of the case as a whole, the decisions they have taken pursuant to their margin of appreciation (*Karman v. Russia*,[12] para 32).

The 'margin of appreciation' appears, when there is no European consensus on the balancing value of the right or when seemingly the same right is constructed differently in different legal cultures. The main points of disagreement between national judges and international judges in human rights cases lay in the approach to the restrictions which may be legitimately imposed on fundamental rights. The member states are trying to retain their power to define, how the general language of human rights provisions should be interpreted in national legal systems—in the context of different cultures and economic situations. The EC*t*HR accepts that 'margin of appreciation' exists in disability cases, but, as it can be seen from its practice, this 'appreciation' refers to the procedure how to draw a fair balance between the competing interests of the persons with mental disabilities and of the community as a whole, but it does not reconstruct the legal rule itself in every new case—the core of the right remains untouched. Thus, in *Lashin v. Russia*[13] it wrote in its discussion of the scope of the right to respect for private and family life for incapable persons:

> In deciding whether legal capacity may be restored, and to what extent, the national authorities have a certain margin of appreciation. It is in the first place for the national courts to evaluate the evidence before them; the Court's task is to review under the Convention the decisions of those authorities… [T]he extent of the State's margin of appreciation in this context depends on two major factors. First, where the measure under examination has such a drastic effect on the applicant's personal autonomy as in the present case…, the Court is prepared to subject the reasoning of the domestic authorities to a somewhat

[11] *Belgian Linguistic Case* (*Case "Relating to certain aspects of the laws on the use of languages in education in Belgium* (*merits*))." Application no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64), Judgment of 23 July 1968.

[12] *Karman v. Russia*, App. no. 29372/02, Judgment of 14 December 2006.

[13] *Lashin v. Russia,* application no. 33117/02. Judgment of 22 January 2013.

> stricter scrutiny. Second, the Court will pay special attention to the quality of the domestic procedure… Whilst Article 8 of the Convention contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Article 8. (*Lashin v. Russia*, para 80–81).

The scope of 'margin of appreciation' may vary depending on the extent of the interference[14] and the nature of the right involved.[15] It is wider in cases of discrimination on grounds of sex or ethnicity, and it is narrower in access to social rights:

> The scope of this margin will vary according to the circumstances, the subject matter and the background… As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention…On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy… Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation' (*Petrovic v. Austria,*[16] para 38).

This approach explains the unwillingness of the EC*t*HR to create positive obligations, which would entail expenditures from the public funds in all the Contracting States:

> The margin of appreciation… is even wider when… the issues involve an assessment of the priorities in the context of the allocation of limited State resources… In view of their familiarity with the demands made on the health care system as well as with the funds available to meet those demands, the national authorities are in a better position to carry out this assessment than an international court. (*Valentina Pentiacova and Others v. Moldova*[17]).

As we can see, the international judges as dialecticians do not seek to check the correctness of social policies or economic measures,[18] but insist on their supervisory

[14] *Aziz v. Cyprus,* application no. 69949/01, Judgment of 23 April 2002.

[15] *Stec and Others v. the United Kingdom*, applications no. 65731/01 and 65900/01, Judgment of 12 April 2006.

[16] *Petrovic v. Austria*, application no. 20458/92, Judgment of 27 March 1998.

[17] *Valentina Pentiacova and Others v. Moldova*. Decision as to the admissibility of the application no. 14462/03, 4 January 2005.

[18] In *Zehnalová and Zehnal v. the Czech Republic* (application no. 38621/97, Decision as to the admissibility, ECHR 2002-V) the ECtHR dismissed the application both under Article 14 (discrimination) and Article 8 (right to private life), in which two applicants with disabilities complained that in their home town many public buildings were not equipped with access facilities for people with disabilities, contrary to Czech law. In Botta v. Italy (application no. 21439/93. Judgment of 24 February 1998) it ruled that failure of the state to implement domestic legislation requiring that private beaches be accessible to people with disabilities did not violate the applicants' right to private life under Art. 8. In *Valentina*

function over the decisions made by the national judges in construction of what constitutes the core of fundamental rights. Further I will show that in constructing basic rights of persons with *mental* disabilities, the EC*t*HR practically leaves no 'margin of appreciation' for national bodies in interpretation of the rights of these group to private life and access to court, to freedom from ill-treatment and arbitrary detention.

4 New Rights for Persons with Mental Disabilities: International Judges as Authors and Dialecticians

The EC*t*HR found it to be correct to interpret the rights to private life, liberty and security of persons and freedom from ill-treatment as protecting mentally disabled persons on equal footing with other individuals. Involuntary hospitalization without judicial control, the indiscriminate use of restraints in psychiatric hospitals, immobilization of the patients by strapping down with no medical justification and no regular checks, disproportionate restriction of persons under guardianship of decision-making capacity in cases affecting their lives—all these practices were found as violating human rights of mentally disabled persons, though these measures have been routinely applied in European countries to legally incapable people without any judicial control. In those cases, where violations of rights of legally incapable persons were found, the EC*t*HR had to argue with the national adjudicating bodies, that national interpretation of the right to family, to freedom from arbitrary detention, to voting, to access to justice, to choice of medical treatment, to privacy, to impart information and ideas (namely, the right to correspondence) was too narrow, because it excluded a whole group of persons from the enjoyment of these fundamental rights. To 'correct' the 'use of names' (i.e. legal rules) so that to bring them into compliance with the values enshrined in the Convention, the EC*t*HR steadfastly pursues the idea, that national legislation should be amended and/or judicial practice in member states corrected so that to secure:

(a) maximum reservation of capacity for persons with mental disorders (*Shtukaturov v. Russia, Lashin v. Russia*);
(b) the right of persons with mental disorders to be heard in person before the court in proceedings on incapacitation and the right to ask a court to review a declaration of incapacity directly, not through an appointed guardian (*Stanev v. Bulgaria*; *D.D. v. Lithuania, Shtukaturov v. Russia, Lashin v. Russia*);

Footnote 18 continued
Pentiacova and Others v. Moldova (Decision as to the admissibility of the application no. 14462/03, 4 January 2005) it found the complaint manifestly ill-founded, because failure of the state to provide free expensive medical treatment, including life-saving medical procedures and drugs, was based on lack of resources, and a call on public funds fell out of the scope of the Convention. However, *in Wintersberger v. Austria* (application no. 57448/00, Judgment of 5 February 2004) it recognized, that the provisions in national legislation, which exist for the benefit of the persons with disabilities, had been justified.

(c) recognition of placement to a psychiatric hospital as 'detention' in the meaning of procedural requirements of Articles 5 (liberty and security of person) and 6 (fair trial) (*D.D. v. Lithuania, Tám v. Slovakia*);
(d) a right to marry where possible (*Lashin v. Russia*).

4.1 Maximum Reservation of Capacity

Discrimination of persons with serious mental disorders is often closely connected to their status of legally incapable persons. Incapacitation makes them fully dependent on the will of their legal guardians, the abuses from the side of these legal guardians are often hidden and the accountability for perpetrators is absent, marriage and parenthood are unattainable even when there is no functional limitation to preclude them. The national courts routinely base their decisions on incapacitation on the presumption that it is for the benefit of mentally ill persons to have guardians who will act in their best interests. These interests for centuries have been understood as food, shelter, medical treatment and preservation of property for the family.

In *Lashin v. Russia*[19] the existing national legislative framework did not leave the Russian judge any other choice than to declare the person concerned fully incapacitated. The Russian Civil Code distinguished between full capacity and full incapacity, but did not provide for any borderline situation, except for drug or alcohol addicts. Therefore, the domestic court in *Lashin* had used the most stringent measure which meant total loss of autonomy in nearly all areas of life. That measure was, in the opinion of the EC*t*HR and in the light of the materials of the case, disproportionate to the legitimate aim pursued: "By analogy with cases concerning deprivation of liberty, in order to justify full incapacitation the mental disorder must be 'of a kind or degree' warranting such a measure" (*Lashin v. Russia*, para 90). After a number of judgements of the EC*t*HR *v.* Russia[20] the national legislators and the judges of the Constitutional Court had to recognize, that introduction of several degrees of incapacitation to the Civil Code of the Russian Federation should be necessary, and the amendments were made into the Civicl Code and the Code of Civil Procedure.[21]

4.2 Access to Court

The EC*t*HR in a number of cases confirmed the right of legally incapable persons to participate in court proceedings on their incapacitation and the right to initiate proceedings to restore their capacity. In *Winterwerp v. the Netherlands*,[22] the

[19] *Lashin v. Russia,* application no. 33117/02. Judgment of 22 January 2013.

[20] See also *Rakevich v. Russia*., application no. 58973/00, Judgment of 23 October 2003, and *Shtukaturov v. Russia,* application no. 44009/05, Judgment of 27 March 2008.

[21] Federal Law №302-FZ of 30 December 2012 "O vnesenii izmenenij v glavy 1-2-3-i-4 chasti pervoj Ggrazhdanskogo kodeksa rossijskoj federacii."

[22] *Winterwerp v. the Netherlands,* application no. 6301/73 of 24 October 1979.

EC*t*HR concluded that although mental illness may render legitimate certain limitations upon the exercise of the 'right to access to court', it could not warrant the total absence of that right as embodied in Article 6 § 1. It also noted, that the 'procedural' guarantees under Article 5 §§ 1 and 4 of the Convention, regulating detention, are broadly similar to those under Article 6 § 1, which guarantees the right to fair trial.

The EC*t*HR expressed the firm opinion, that if a person lacks the ability to administer his affairs, it does not mean that he is incapable of expressing a view on his situation and thus of coming into conflict with the guardian. He may wish a change of guardian, or disagree with him about the medical treatment and type of institution where he receives it. Thus, he needs a right to be heard. Though "mental illness may entail restricting or modifying the manner of exercise of such a right, but it cannot justify impairing the very essence of the right."[23] The position of EC*t*HR judges is that the key principle governing the application of Article 6 is fairness, so when they decide cases of persons with mental disorders, they analyse them from this angle.

In *Stanev v. Bulgaria*[24] the EC*t*HR found that Mr. Stanev's right to a fair trial under Article 6 of the ECHR had been violated, because under Bulgarian law he needed his guardian's consent to initiate a proceeding of challenging restrictions on his legal capacity. In this regard, the Court referred to the growing emphasis that international law places on the legal autonomy of persons with disabilities, stating that it

> is also obliged to note the growing importance which international instruments for the protection of people with mental disorders are now attaching to granting them as much legal autonomy as possible,

and drew attention to the United Nations Convention on the Rights of Persons with Disabilities. Speaking about legal status of persons placed under partial guardianship and their representation before the courts, The *ECtHR* noted:

> The right of access to the courts is not absolute but may be subject to limitations… In laying down such regulation, the Contracting States enjoy a certain margin of appreciation… Nonetheless, the limitations applied must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired …. Furthermore, the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (*Stanev v. Bulgaria*, para 6–7).

As a result of its well-established practice, The EC*t*HR constructed the direct access to court as one of the fundamental procedural rights for the protection of persons deprived of legal capacity. Thus, now national judges even in absence of domestic norms have no discretion to define, whether the persons with mental disabilities should have access to court, the 'margin of appreciation' allows national authorities only to define the procedure by which such direct access is to be realized,

[23] *D.D. v. Lithuania,* Application no. 13469/06, Judgment of 14 February 2012, para 50.

[24] *Stanev v. Bulgaria,* application no. 36760/06, 17 January 2012.

for example, by limiting the frequency with which applications for reconsideration of their status be made (*Lashin*, para 18).

This idea was earlier developed in other cases:

> In the context of Article 6 § 1 of the Convention, the Court accepts that in cases involving a mentally-ill person the domestic courts should also enjoy a certain margin of appreciation. Thus, for example, they can make appropriate procedural arrangements in order to secure the good administration of justice, protection of the health of the person concerned, and so forth (*D.D. v. Lithuania,*[25] para 49; see also *Shtukaturov v. Russia*, cited above, para 68).

It should be mentioned, that the EC*t*HR in constructing this fundamental right for the persons with mental disorders based its approach on

> a trend at European level towards granting legally incapacitated persons direct access to the courts to seek restoration of their capacity,

which was supported by the statistics: in seventeen States such access is open to those declared fully incapable (*Lashin*, para 19, para 29–31). This is an evidence that new legal concept of the right to access to court for incapacitated persons has been developed through cross-fertilization of different legal cultures within Europe and that the international judges as 'dialecticians' have been trying to find the 'correct meaning' of the general wording among variety of already existing meanings rather than have been creating, or writing, their own legal concepts.

4.3 Placement to a Psychiatric Hospital as 'Detention'

Though Article 5 of the ECHR guarantees everyone who is deprived of his liberty by detention "to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful", the EC*t*HR in a number of cases had to analyze the situation when persons were placed into psychiatric hospitals against their will and without sufficient medial justifications by the initiative of their guardians. The court review was not required, because the national legal systems considered such placement as 'voluntary', made upon 'consent', and the placement into the hospital was not interpreted by judges of many countries (Lithuania, Slovakia, Bulgaria, Russia between them) as 'detention'. As a result, persons deprived of their legal capacity were also deprived of their legal standing to bring cases before courts in any matters related to their rights. This restriction extended to complaints against abuses committed by public authorities. When institutionalised, these persons were fully prevented by the institution from any form of communication and, as a result, were unable to report abuse to any third party. They were also prohibited by law from instituting any proceedings against the institution. Practically, deprivation of legal capacity meant a life sentence. The EC*t*HR's approach is that incapacity decisions should not be made for an indefinite period of time, they must be subject to periodic review, and a person himself or herself (not only the legal guardian) should have a right to lodge an application

[25] *D.D. v. Lithuania,* Application no. 13469/06, Judgment of 14 February 2012.

initiating restoration of legal capacity proceedings. In *Lashin v. Russia*[26] the EC*t*HR stressed that

> the right to ask a court to review a declaration of incapacity is one of the most important rights for the person concerned since such a procedure, once initiated, will be decisive for the exercise of all the rights and freedoms affected by the declaration of incapacity, not least in relation to any restrictions that may be placed on the person's liberty (*Lashin*, para 17; see also *Shtukaturov v. Russia,*[27] para 71).

The Grand Chamber of the EC*t*HR in *Stanev* case, cited above, found that the applicant was 'detained' in a social care institution, because there was 'a deprivation of liberty'. The person can be considered to have been deprived of his liberty, if this persons has been confined in a particular restricted space for a not negligible length of time and he has not validly consented to the confinement in question (*Stanev*, para 36–37; *Storck,*[28] para 74). In the context of deprivation of liberty on mental-health grounds, the Court in *Ashingdane v. the United Kingdom*[29] also held that a person could be regarded as having been 'detained' even during a period when he was in an open hospital ward with regular unescorted access to the unsecured hospital grounds and the possibility of unescorted leave outside the hospital.

In *Tám v. Slovakia,*[30] where the applicant, who was diagnosed with schizophrenia and was detained in a psychiatric hospital, complained, that though the national law required a court to review the lawfulness of his detention, this had not been done, the EC*t*HR ruled:

> Under Article 5 § 4, an arrested or detained person is entitled to bring proceedings for the review by a court of the procedural and substantive conditions which are essential for the "lawfulness" of his or her deprivation of liberty… Article 5 § 4… also proclaims their right… to a speedy judicial decision concerning the lawfulness of detention (*Tám v. Slovakia*, para 65).

The EC*t*HR based its approach on the observation, that right to liberty of person, enshrined in the Article 5 § 1 of the Convention,

> must be construed as laying down a positive obligation on the State to protect the liberty of those within its jurisdiction. Otherwise, there would be a sizeable gap in the protection from arbitrary detention, which would be inconsistent with the importance of personal liberty in a democratic society (Stanev, para 40).

As distinct from the international judges, the national authorities were not ready to consider placement into psychiatric institutions as 'detention'. In *Stanev*, the Bulgarian government submitted that the applicant's placement in the home was

[26] *Lashin v. Russia,* application no. 33117/02. Judgment of 22 January 2013.

[27] *Shtukaturov v. Russia,* application no. 44009/05, Judgment of 27 March 2008.

[28] *Storck v. Germany*, application no. 61603/00, Judgment of 16 June 2005.

[29] *Ashingdane v. the United Kingdom,* application no. 8225/87, Judgment of 28 May 1985.

[30] *Tám v. Slovakia*, application no. 50213/99, Judgment of 22 June 2004.

made upon consent, because the agreement was signed by the guardian with the social care institution in the interests of the applicant, and the guardian's consent was fairly treated by the domestic courts as the consent of the legally incapable person himself. In case of *D.D. v. Lithuania*[31] the Lithuanian government argued, that the information presented by the applicant was untrue, because "an appropriate and carefully selected form of social care for the applicant had been portrayed as detention, appropriate medical care and striving to save her life had been presented as her torture" and that as far as the applicant's interests at the district court had been defended by the representatives of the health case institution and the Social Services Department plus the public prosecutor, the district court had reasonably found that the applicant had been properly represented at the hearing and thus the provisions of domestic laws, on which the applicant had based her request to reopen the proceedings, had not been breached. (*D.D. v. Lithuania*, para 43). In *Shtukaturov*, the Russian government submitted that the applicant was placed in the hospital at the request of his official guardian in relation to a worsening of his mental condition, and in such circumstances, there was no need for a court order authorising the confinement. According to paragraph 2 of Article 31 of the Civil Code of the Russian Federation, if a person is legally incapable, it is his official guardian who should act in his stead before the administrative bodies or the courts. The applicant's official guardian did not lodge any complaint, therefore the applicant's rights had not been breached (*Shtukaturov v. Russia*, para 98). In *H.L. v. The United Kingdom*[32] the UK government insisted that the applicant, an autistic man, unable to speak and with lack of the capacity to consent or object to medical treatment, who was taken to a hospital after the incident at a day-care center for in-patient treatment, had been 'informally admitted' and, consequently, had not been 'detained'. In *Lashin v. Russia,* cited above, the government and the national judges argued that provisions of Article 5 of the Convention, which guarantees the liberty of person from arbitrary detention, could be applied only to those who were confined to a hospital against their will, but in domestic terms the applicant's detention was 'voluntary', because a consent from the institution as a legal guardian had been obtained.

The international judges disagreed with such approaches. Instead, in formulating the scope of the right to liberty for legally incapable persons, they included procedural guarantees:

(a) "a person of unsound mind who is compulsorily confined in a psychiatric institution for an indefinite or lengthy period is in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings "at reasonable intervals" before a court to put in issue the "lawfulness"—within the meaning of the Convention—of his detention;
(b) Article 5 § 4 requires that the procedure followed have a judicial character and give to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question…

[31] *D.D. v. Lithuania,* Application no. 13469/06, Judgment of 14 February 2012.

[32] *H.L. v. The United Kingdom*, application no. 45508/99, Judgment of 5 October 2004.

(c) …it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation" (*D.D. v. Lithuania,* para 58).

These procedural guarantees are emerging from the Court's case-law on Article 5 for those who have been detained under criminal law, and the international judges as wise dialecticians extended them to persons with mental disorders, because from human rights point of view it really seemed illogical, why prisoners had a right to appeal their confinement and ask for periodic review of their case while patients of the psychiatric hospitals had not.

4.4 Right to Marry

In *Lashin v. Russia*, cited above, the EC*t*HR mentioned a comparative research of national laws concerning the right of persons with mental disabilities to marry. Covering 25 member States of the Council of Europe, this research demonstrated that in approximately one half (13/25) of the States an incapacitation decision automatically leads to the loss of the right to marry. In approximately one-third (9/25) of them a guardian's consent to the conclusion of marriage of an incapacitated person is needed. An express ban on the right to marry for mentally disabled persons is in place in six of the 25 member States. The language and procedures used to verify the legal consequences of the mental insufficiency in the marital sphere vary considerably from one member State to another.

However, the Family Code of the Russian Federation makes it impossible to marry if at least one of the would-be spouses has been declared incapable by a court because of a mental illness. A marriage may be dissolved at the request of the guardian of a spouse who has been declared incapable by the court. The applicant complained that he had not been able to register a marriage with his fiancée. The EC*t*HR observed that his inability to marry was one of many legal consequences of his incapacity status. As far as he was unable to marry primarily because of the same two major factors analysed under Article 8 of the Convention, which guarantees the right to respect for private and family life, the Court in view of the findings under this Article decided, that there was no need for a separate examination under Article 12 of the Convention, which guarantees the right to marry. EC*t*HR found that such blanket ban on the right to marry for persons under guardianship is incompatible with the European Convention.

It is interesting to note, that the statistics, adduced by the EC*t*HR, does not convincingly show that the European consensus exists on the granting the right to marry to legally incapable persons—vice versa, it reveals a consensus that full incapacitation should lead to a ban to marry—at least, without the consent of a guardian to do so. However, the international judges are ready to review the domestic standards so that to construct new vision of this basic right, based on human rights standards rather than on pragmatic considerations (such as desire to avoid abuse of rights of persons with mental disabilities from the side of unhonest property-seekers and fraud marriages). Again, they do not hurry up to 'write' a new right for individuals with serious mental disorders, but try to reconstruct the legal

rule, which provides the right to marry, in every new case so that to elucidate the 'correctness of the name', expressed by the word 'marriage' in different legal contexts.

5 Conclusion

As it can be concluded from the analysis of the cases, the EC*t*HR re-defined the nature and scope of the right to non-discrimination by adding new grounds and new legal powers to the victims. It also extended the 'traditional' way of thinking about such legal notions as 'liberty of person', 'detention', 'incapacitation', applied by national judges within national legal systems. At the same time, the EC*t*HR does not hurry up to construe positive obligation for the states to provide services and benefits.

It is interesting to note, that when the EC*t*HR deals with interference of the state in the fundamental rights, it acts more as an 'author', while in situations, when the aim is to protect the rights of others or to equalize opportunities, it prefers to remain a 'reader' of the national legislation. Though the international judges reiterate, that it is on the first place for the national courts to evaluate the evidence before them, assess what might be the best policy for protection of human rights in a particular field, and to interpret national legislation, it is for the international judges to supervise that the very essence of the right is not impaired and that the content of right is understood in the meaning, which they have been constructed in EC*t*HR jurisprudence.

The general trend shows that the EC*t*HR, in order to secure the right of persons with mental disabilities to non-discrimination, which has in the text of the Convention a procedural nature, grants these persons the substantive rights to liberty, fair trial, family, marriage, privacy, which they have deprived for centuries in national legal systems, because their incapacitation turned them from human subject into object of basic care and support. In treating incapacitated persons with fundamental rights which they could realize in person as human beings, the EC*t*HR step-by-step constructs the universal European hierarchy of values, which it seeks to promote. In this hierarchy a human being is in the center of the universe, not his/her property or convenience for the guardians.

Having this in mind, we can conclude, from the one side, that the EC*t*HR is on the way to create new rights for persons belonging to the disadvantaged group. From the other side, we may look at international judges as dialecticians, who contest the 'correctness' of 'names', given to the concepts, covered by the 'liberty and security of person', 'detention', 'access to court' and 'marriage'. They try to 'peel' the substance of the fundamental rights from interpretation, which has been given to them by other interpreters—national legislators and judges, and try to 'correct' the 'names', given by the drafters of the Convention, by applying the words of the articles in coincidence with the metaphysical nature of the object of inquiry. In Plato's terms, an international judge, as 'name' overseer', that is 'dialectician', directly investigates the things themselves in order to correct the name given in a

legal rule with a purpose to reveal its 'true meaning' and apply according to its natural value.

It should be mentioned also, that EC*t*HR does not recourse too often to a wide interpretation of the rights enshrined in the Convention, which would allow criticizing it for 'writing' new rights. For example, in *Belgian Linguistic case*[33] it refused to interpret the right to education under Article 2 of Protocol 1 as the right to receive education in the specific language of instruction of one's choice (the intent of drafters, or original 'authors', was a major argument, based on 'preparatory work'). In *Romanenko v. Russia* it refused to formulate the standard that the word 'others' in the clause 'protection of dignity of others' of Section 2 Article 10 on freedom of expression should apply only to individuals or legal entities and should not extend to State bodies, politicians and public figures in their claims against mass media.[34] In *Vereinigung Bildender Künstler v. Austria*[35] it refused to recognize '*exception artis'* as a part of freedom of expression. In the last two cases it made decision in favour of the applicants, but avoided interference with the national legislation, having preferred to deal with particular facts of particular cases rather than to 'write' new rules for future. Consequently, the international judges consider national legislators and national judges as a significant part of their audience, whose adherence and consent should be gained. The adherence to the reasoning can be better achieved, when the international judges leave some discretion to their national counterparts—at least, figuratively, because legal positions, expressed in the case-law of the EC*t*HR, should be followed by national judges anyway.

The international judges more attentively, than national ones, listen to the stories, told by the parties (reflected in the submissions by the applicants and the governments), and, as Paul Gewirtz stated, "look at facts more than rules, forms as much as substance, the language used as much as the idea expressed" [3: 3] The analysis of the EC*t*HR jurisprudence confirms the postulate of Gewirtz about the transactional nature of law—that is, an activity involving audiences as well as sovereign law givers. The international judges also more, than their national colleagues, encourage awareness of the particular human lives that are the subjects or objects of the law. Finally, the experience they bring into their decision-making from different legal cultures, helps them in shaping the universal understanding of human rights texts based on dialectical approach.

[33] *Case "Relating to certain aspects of the laws on the use of languages in education in Belgium (merits)"*, application no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64), Judgment of 23 July 1968. The Court stated about the original intent of the authors, that "if they had intended to create for everyone within their jurisdiction a specific right with respect to the language of instruction, they would have done so in express terms in Article 2 of the Protocol (P1-2). For this reason also, the Court cannot attribute to Article 14, when read in conjunction with Article 2 of the Protocol (art. 14 + P1-2), a meaning which would secure to everyone within the jurisdiction of a Contracting Party a right to education conducted in the language of his own choice" (para 11).

[34] *Romanenko* et al. *v. Russia*, application 11751/03, Judgment of 8 October 2009, para 29. See also concurring opinions.

[35] *Vereinigung Bildender Künstler v. Austria*, application 68354/01, Judgment of 25 January 2007.

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