*Mirjana Lazarova Trajkovska**

# THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A LIVING INSTRUMENT

***Keynote speech***

## Introduction

This Conference is dedicated to the 70th anniversary of the European Convention on Human Rights the Convention was adopted in 1950, when the founding fathers could hardly have imagined that it was the doctrine of a living / evolutionary instrument that would make the Convention the most frequently cited international treaty. At that time, coming out of the World War II, Europeans needed a strong agreement built on the principle of consensus on what the new post-war Europe should look like. The result was the European Convention as "an instrument designed to uphold and promote the ideals and values of a democratic society" aided by "institutions created to protect individuals"[1]. On the other hand, this written instrument could not cover all possible challenges, so the evolutionary approach embedded in the Tyrer v. United Kingdom case opened the door to the Convention to meet all the challenges and changes that were coming[2]. Through this judgment, the Court was given the task of "interpreting and applying" the Convention, which left the Convention open for the society that was developing very rapidly.

The dynamic approach and acceptance of the evolutionary doctrine was largely relying on the Preamble to the Convention as it refers to "the maintenance and further realization of human rights and fundamental freedoms". The very term "evolutionary approach" or "living instrument" leads to the legal philosophical thinking that the Convention is not struggling to survive, but that it evolves following the dynamics of the time in which it is applied. Some of the rights and freedoms that the text of the Convention does not mention at all, such as same-sex communities, Surrogacy, the Internet and the protection of personal data have been promoted and further developed over the past 70 years of the Convention.

The case law has confirmed that sometimes the inspiration for moving forward comes from positive changes in the national laws of the member states, such as the right to private and family life. This trend is present in the protection of the rights of children, persons with disabilities, in relation to the freedom of the sexual orientation for which a new European consensus was gradually being built. On the other hand, the rapid development of various technologies and techniques and their threat to the right to privacy have necessitated the articulation of relevant standards in the protection of the right to privacy. In recent decades, technology and electronics have become an integral part of every segment of our lives. We shop online, campaign is organized on line and we vote, we read newspapers, meet friends. In the case of Szabó and Vissy, the Court noted the need for stronger protection of privacy in relation to the possibility of mass surveillance and the danger of interference through the use of the Internet.

However, the Court must always leave clear and unambiguous explanations in order to convince even the greatest skeptics of any evolutionary step that should be built on the European consensus, or that it

* Mirjana Lazarova Trajkovska, PhD., judge at the Supreme Court of the Republic of North Macedonia, former judge of the European Court of Human Rights, e-mail: mirjanatrajkovska@vsrm.mk

[1]Soering v. United Kingdom (No. 14038/88), judgement of 7 July 1989 § 87, and Klass and Others v. Germany (No. 5029/71), judgement of 6 September 1978 § 34.

[2]Tyrer v. the United Kingdom, no. 5856/72, 25 April 1978.

faces a new a dangerous form of human rights threat. If it does not enter into a sufficiently convincing argument, the Court will face strong criticism.
That is why this old and modern 70-year-old living instrument equally needs the wisdom and experience gained in the past seven decades as it needs flexibility and modernity to the new challenges of the digital age. Due to its ability to accept the challenges of the new while preserving the old and the valuable, the doctrine of the living instrument underpinned by the principle of efficiency has grown into one of the pillars of Strasbourg case law. This doctrine is based on the approach that the Convention should be applied practically and not theoretically and illusory. Of course, this doctrine has gone through a lot of criticism, mostly from the member states, so in the years of reforms, the Court was often called upon to strengthen the principle of subsidiarity.
On the one hand, we will always strive to maintain what has already been achieved in the protection of human rights, and on the other hand, the voice of those who will call for the need to move forward in the protection of human rights will always be heard. In that sense, the Court identified and answered questions through times of change conditioned by technological, scientific, socio-political change. However, in applying the doctrine of the living instrument, the Strasbourg Court was also helped by the factor of time. Before reaching the Strasbourg Court, the raised legal question needed time to be answered by the national courts, as all domestic legal remedies had to be exhausted. Nevertheless, in the age of new technologies and electronic techniques, in the age of digitalization of the space around us, the freedom of expression guaranteed by Article 10 is most often affected, which includes the right to receive and transmit information as well as the right to respect the private life guaranteed by Article 8 of the Convention. The Internet and the way it was used brought before the Court in Strasbourg the cases of Delphi AS, of Ahmet Yildirim v. Turkey, on the Editorial Board of Pravoye Delo and Shtekel v Ukraine.

**The evolutionary nature of the Convention seen through the jurisdiction of the Convention**

However, in order to understand the evolutionary advances of the Convention, one must understand the jurisdiction in the context of Article 1 of the Convention in accordance with the standards of Article 6. Article 1 of the Convention provides: "The High Contracting Parties shall recognize to all persons under their jurisdiction the rights and freedoms set forth in Part I of this Convention." The basic principle regarding the jurisdiction of the Contracting Parties is that the jurisdiction is primarily territorial and it is assumed that it is normally practiced in the territory of the Contracting State. Over time, applying the Doctrine of the Living Instrument, the Court has accepted that actions taken and those producing effects outside the territory of a Contracting State may be the basis for the application of Article 1 of the Convention.
However, these are exceptional situations and they can be divided into two groups: the exercise of state control and authority over an individual and the exercise of effective control over an area outside the state borders as a result of legal or illegal military action.
During the time of pandemic, we found that our society could not function without the Internet and online communication, and Internet function beyond physical boundaries and operate on a cross-border basis. That means cross-border operation and a global approach.
Although the Court is aware of the significance of the issue of jurisdiction in the field of electronic communications, it would be wrong to say that this is entirely new issue to the case law. Even in some of the first cases related to the protection of personal data and the use of special investigative measures, the Court discussed the interference into the right to privacy when the interference was on the territory of the state and the person was in a completely third territory. In Weber and Saravia v. Germany, for

example, the applicants were staying in Uruguay while communications were being monitored from German territory. In Liberty and Others v. the United Kingdom, decided in 2008, the communications subject to surveillance were located for the two entities located in Ireland and one in the United Kingdom, but the question of jurisdiction under Article 1 of the Convention was not raised at all by the applicants.

In recent case law, the issue of jurisdiction has been at the heart of the appeal in the Big Brother Watch case, which relates precisely to the purpose and scope of the electronic surveillance and surveillance programs used by the United Kingdom. The applicants complained that the national laws were not in conformity with the Convention because they allowed interference with their right to privacy in the absence of appropriate procedures and protections and thus the ability to share the information collected with foreign services or governments.

The Grand Chamber in the Big Brother case will have the opportunity to address the issue of jurisdiction under Article 1 of the Convention. The question for effective control on the territory of the state, the court will have to analyze and in the context of the use of digital equipment, especially in relation to cyber surveillance by the state.

In another case, in Privacy International and Others v. the United Kingdom, an NGO from the country, is an online service provider registered in the UK, US and South Korea and an association of hacktivists registered in Germany. They claim that their equipment was subject to interference colloquially known as "hacking" - for an indefinite period by the UK Communications Service and / or the Secret Intelligence Service. This monitoring was based on national legislation which left room for the Secretary of State to authorize actions against persons outside the UK in cases where the act of liability took place in the United Kingdom. The main question regarding the competence was whether the competence extends to equipment placed outside the UK.

From the above pending cases, it is clear that the doctrine of the living instrument is inspired not only by present-day conditions, which are constantly changing, but also by the development of international law and the need to consider the need to promote protection of human rights.

**The evolutionary nature and impact of the Court's methodology**

The Convention has been changed through cycles of reforms that have led to changes in the procedures and working methods. In addition to protocols that strengthened human rights and freedoms, others underwent procedural and structural changes. For example, Protocol no. 9 empowering the individual to seize the Court; Protocol 11 created the permanent ECtHR; Protocol 14 enabled the filtering and changes of the judicial formations.

The Court used the evolutionary doctrine to upgrade the Court's methodology of work. Faced with problems of mass and often systemic human rights violations, the Court has developed a practice of involving pilot judgments. In addition, since the beginning of 2003, the Court has accepted the unilateral declaration and this practical approach was later transmitted into the Rules of Court. Friendly agreements, the development of the methodology of giving the priority of some particularly complex and difficult cases or of some particularly vulnerable categories of persons reflects the evolutionary nature of both the changes and the development of the Court's methodology. Relying on the evolutionary character of the Convention, the Court was able to adapt the methodological approach to the time, to the number of cases, taking care not to lose the individualization in resolving the appeals.

Even after World War II, Europe went through and is going through many armed conflicts. Thus for example the conflict between Cyprus and Turkey escalated into

In 1974, the war in Bosnia and Herzegovina immediately after the break-up of Yugoslavia, the armed conflict in Macedonia, the armed conflict between Georgia and Russia in 2008, in 2014 Russia's declaration of its territory in Crimea, the armed conflict in the Donbass region is still ongoing. and a

month ago Armenia and Azerbaijan entered into an armed conflict over Nagorno-Karabakh. In addition, European countries have participated with their armed forces in Iraq, Afghanistan, Syria and Mali. All these conflicts are related to the member states of the Convention and have resulted in a number of individual appeals to the Strasbourg Court such as Varnava, Al Skeini, Hassan, but also a number of interstate cases. Although the Convention was created primarily as an instrument for individual complaints, using the doctrine of a living instrument, the Court accepted to decide on a number of interstate disputes (such as Cyprus v. Turkey, Georgia v. Russia, Ukraine v. Russia, Croatia v. Slovenia). etc.). This means that in times of armed conflict, not only humanitarian law but international human rights law applies.

When it comes to cases involving interstate dimensions, the Court has to answer very complex questions, and sometimes organize fact-finding missions or hearings or engage in an assessment of procedural aspects such as a lack of effective and thorough investigation. For these reasons, in recent decades the Court has invested a great deal of energy in these cases in order to promote the values of the protection of human rights as an element of integration and acceptance of European values.

El Masri Sasho Gorgiev Stolkova Selmani and the others X against RMacedonia

**Challenges before the Court in today's Europe**

Today, in many European countries, the human rights situation is more than worrying. Very rapid, controversial and backward changes are accepted and incorporated into national laws and they lead to systemic human rights violations that will be difficult or even impossible to correct or change. For example, in Poland (and until a year ago in Macedonia) the right of women to decide on abortion was the occasion for more than 100,000 citizens to protest in the streets for days. In many countries, the independence of the judiciary is under severe pressure and the integrity of the judiciary is being undermined by various forms of intrusion into the judiciary, such as amnesties, pardons, quick changes in law, attacks on judges, sentencing and dismissal of judges like never before. On the other hand, the pressures on the non-governmental organizations, on the defenders of human rights are strong, and academic freedom is under no less pressure.

In many countries, the pandemic situation has served as a basis for discriminatory treatment of the elderly, children from different walks of life, and people from the LGBT community. Cases of stigmatization and discrimination of people with disabilities are becoming more frequent. And knowing that it takes time for national remedies to be exhausted, delayed justice leads to great injustice that often affects a large number of people.

The judiciary, the academic environment, the non-governmental sector, the human rights defenders have a more dimensional and responsible task in the system of protection of human rights. The central and most visible position with the greatest responsibilities belongs to the judiciary and any shaking of the capacities of the judiciary is the overthrow of the state institutional capacities to ensure effective protection of the rights and freedoms protected by the Constitution and the Convention. The examples of Hungary and Poland in changing the status and place of the judiciary under the guise of alleged judicial reform have provoked reactions and concerns in European countries.

Undoubtedly, the rule of law is under strong pressure and we are facing new situations that have a direct impact on human rights, democracy and justice. In this regard, the role of the Strasbourg Court will be particularly important in ensuring that national courts are independent, that they are protected from unlawful dismissal, and that any attack on the judiciary will be sanctioned. In this regard, the existing case law will be clearly changeable, but there will undoubtedly be cases that will require a step towards the case in relation to Article 6 of the Convention and in the area of a fair trial.

The doctrine of the living / evolutionary instrument has been exalted, but it has also been criticized for suggesting that the Court should refrain from activism and focus on "the real great evils". However, there is an indisputable consensus that the Court was established to act and function as the "Conscience of Europe" and must protect it resolutely and swiftly and protect the rule of law as a valuable asset. So in recent months we have seen the Court impose a number of interim measures, such as in the case of Navalny or in the Nagorno-Karabakh conflict between Armenia and Azerbaijan.

Dear colleagues and friends,

We live in a time of uncertainty, conflict, pandemics, and these are real threats to the fundamental values on which Convention law is based. The value system in the protection of human rights has never been more important than today when we celebrate the 70th anniversary of the Convention and as guardians and protectors of human rights, as respecters of the fundamental values of the Convention we today have an important role that requires courage and dedication.

Thank you