



STARPTAUTISKO TIESĪBU APAKŠNOZARE

PRIORITY OF CONSTITUTION AND POSITION OF INTERNATIONAL TREATIES IN LEGAL SOURCES SYSTEM

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Ensuring provision of human rights is a basic principle of a democratic state, as well as one of the elements of the rule of law. The State has the responsibility to provide the human rights and freedoms, as well as to eliminate any potential violations. The preamble to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) states that respect for human rights and fundamental freedoms can best be accomplished by an effective political democracy.

The purpose of the study is to determine the values of the Constitution for the national judicial decisions in Latvia and Finland to ensure the right to a fair trial in the context of the provisions of the European Convention and the ECHR and the most effective mechanisms to enforce the ECHR decision in the national court proceedings.

In a study presented to the comparative analysis of the Constitution of the European countries, Russia and the US, on the basis of which the author presented the position that the protection of national security and human rights of the Constitution states take precedence over international law, which only complement its basic principles.

The dialectical method was used in analysing the implementation of the European Convention, while preserving the sovereignty of the Council of Europe member states. Formal-logical method used in the study of provisions of the Constitution of Republic of Latvia and the Republic of Finland, the European Convention, the Court's practice, and others.

The enforcement of the method of analysis and synthesis has secured a systemic approach to the study of the theory of statehood and law.

Formulated by the author and findings complement and develop the present in the theory of state and law sections on Human Rights to a fair trial.

The supremacy of the Constitution of the Republic of Finland consolidated in Article 106. If, in a matter being tried by a court of law, the application of an Act would be in evident conflict with the Constitution, the court of law shall give supremacy to the provision in the Constitution¹. According Chapter 8 Section 94 (3) of the Constitution of the Republic of Finland an international obligation shall not endanger the democratic foundations of the Constitution.

According to article 6, the US Constitution and the United States laws passed within its framework, as well as all the treaties concluded or to be signed on behalf of the United States, represent the supreme law of the country. At the same time, the American constitutional and legal doctrine divides the international treaties into self-executing ones (the enforcement of which does not require changing the national legislation) and non-self-executing ones that assume changes in the national legislation [6 U.S. (2 Cranch) 64, 118 (1804)]. In the event of collision of norms of a self-executing international treaty and a national US law, with regard to their equal legal force, the applied rule is the one that was issued the latest (last-in-time rule). In one of the judgements, the court of appeal found that "the rules of international agreement on extradition concluded between USA and France contradict to the Fourth Amendment to the US Constitution and therefore are not subject to enforcement"².

The criteria for limitations of international treaties were formulated later by the American judicial authorities within the framework of the doctrine of self-executing treaties, on the basis of interpretation of the relevant provisions of the US Constitution. The origination of the doctrine of self-executing international treaties in the legal practice of the United States has roots in the judgement made in 1829 by the Chairman of the Supreme Court of the United States John Marshall, with regard to Foster case, that concerned the enforcement of the Spanish-American treaty of 1819 which was specifying, inter alia, the legal consequences of transfer of Florida to the United States, alienated from Spain.

In particular, Professor Bederman David J. referred to the effectuation of international law norms in the legal system of the United States as follows: "Regardless of whether the matter of consideration is a legal dispute in connection with an air crash, which may involve the provisions of the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air for its resolution, ... or protection of human rights guaranteed by the Covenant on Civil and Political Rights of 1966, in all these cases, one of the key issues is the question of possible use of the relevant international treaties as the sources of legal norms, that impose legal obligations on the parties to a court process held within the United States"³.

Other American researchers, upon consideration of the enforcement of the international law rules, also refer to the United States Constitution and the legal precedents that were used as a background for interpretation of a number of provisions of this document.

One of the American courts of appeal confirmed this position in the judgement with regard to the case of Committee of United States Citizens Living in *Nicaragua v. Regan*⁴. The Court noted, "Not a single ruling of the Congress may be challenged only on the grounds that it violates the common international law". The Court also pointed out that the political and judicial authorities of the United States have the right to ignore the rules of customary international law in the process of enforcement of laws and other federal statutory acts.

In considering this case, the Court of Appeal referred to Professor L. Henkin, noting that in a number of European countries treaties take precedence over all inconsistent laws⁵.

Nevertheless, "the jurisprudence of the

Supreme Court in respect of the treaties inevitably reflects certain assumed obligations of the international law and of the legislation of the United States of America..."⁶.

A landmark in the international law of the United States was the consideration case of *Filartiga v. Pena-Irala*, Court of Appeals, Second Circuit, 30 June 1980. The court issued a precedent for US federal courts prescribing punishment to the USA aliens for tortious acts committed outside the United States, in violation of the international public law where the USA is a party. Thus the jurisdiction of the USA courts in respect of civil tort was extended.

The Court held that the extension of the international law also changed the principle of the internal law, when the acts of the Congress can not be infringed, but it is possible to replace the earlier contradictory treaties or customary rules of international law.

The author emphasizes that the Italian judicial practice adheres to a dualistic conception, as concerns the relationship between the international and national law. The treaty, like in the USA, has the same legal status as the law. In the event of collision between the constitutional provisions and the international treaty, the priority in enforcement is given to the Constitution. In one of the cases, the Constitutional Court of Italy recognized that "the covenant on extradition between the USA and Italy is unconstitutional and therefore can not be applied"⁷.

The author also refers to the B.I. Osminin's data on domestic procedures required for expressing consent to the binding authority of international treaties⁸. The international treaties concluded with prior consent of the Parliament, rank higher in the internal law of Spain than ordinary laws, but are inferior to the Constitution and should not contradict to it.

In Portugal, the international treaties concluded with the approval of the Parliament, have priority over the ordinary law, but are inferior to the Constitution.

In Spain, according to art. 96 (1) of the Constitution, the properly concluded and officially published international treaties form part of its national legislation. The international treaties concluded with prior consent of the Parliament, rank higher in the internal law of Spain than ordinary laws, but are inferior to the Constitution and should not contradict to it.

According to the Constitution of France, conclusion of international treaties or covenants

containing provisions contrary to the Constitution is possible only after its revision (Art. 54). If the Constitutional Council rules that an international obligation is contrary to the Constitution, then the permission to ratification may be given only after revision of the Constitution. In this respect, the provisions contrary to the Constitution may be interpreted in a broader sense, as affecting or jeopardizing the essential conditions of the national sovereignty.

In the Netherlands, in accordance with art. 91(3) of the Constitution, any provision of the international treaty that is in conflict with the Constitution is subject to approval by the majority of not less than 2/3 of the votes of the States General.

In the UK, an international treaty, even ratified and consummated, does not become part of the national law and may not be applied by the national courts as far as it is not implemented into the national legislation as a separate law. After that, it gains the effect of ordinary act that may be changed by a subsequent act.

The Constitutional Court ruled, as early as in 2005, that international norms of human rights and the practice of applying them on the level of constitutional law serve as a means of interpretation for establishing the content and scope of fundamental rights and the principles of a judicial state, insofar this does not lead to decreasing or restricting the human rights that are included in the *Satversme*⁹.

The Constitutional Court secures protection of human rights as well in conformity with the norms of the Constitution, applying different articles for particular cases. For instance, the Constitutional Court recognized that article 92 of the Constitution in conjunction with article 90 of the Constitution envisage the legislator's duty to stipulate explicitly a procedure in the legal norms that will secure the individual's explicit and firm confidence of his ability to protect his fundamental rights (Judgment of 24 October 2013 by the Constitutional Court in Case No. 2012-23-01, para 14.4 of the Findings).

As an example, the author refers to a similar practice of defending the fundamental national rights by the Federal Constitutional Court of the Federal Republic of Germany, which relies on the legal position, worked out on July 13, 2010, regarding the "restricted judicial validity of ECHR's rulings". In particular, in considering the issue of enforcement of the ruling of the European Court of Human Rights as of 26 February, 2004

with regard to case of *Görgülü v. Germany*¹⁰. ECHR accepted that the refusal to commit the child to the care of his father without sufficient scrutiny of the matter and depriving the father of the right to see the child was breaching the relevant article of the Convention.

In June 2004, the Court of Appeal in Naumburg (Oberlandesgericht Naumburg) resolved that complying with ECHR judgements is not mandatory for the German courts. The Court emphasized that ECHR is not a higher judicial authority for the German courts. In the opinion of the Court, the judgement of ECHR creates an obligation for Germany as a subject of international law, but not for its courts of law – "the authorities responsible for administration of justice, which are independent, according to art. 97.1 of the Basic Law".

The Federal Constitutional Court of Germany formulated the principle of the priority of the national constitution to the judgements of the European Court: The text of the ECHR and the practice of ECHR serve as means of interpretation on the level of constitutional law to determine the contents and scope of fundamental rights and the principle of the law-governed state, as far as it does not lead to decrease or limitation of fundamental rights, included in the Basic Law, that is – to influence, which is precluded by Article 53 of the ECHR¹¹.

The Constitutional Court pointed out that in Germany the European Convention, as well as the protocols thereto, have only the status of federal law, so Germany's Basic Law "is not open to the international law to the maximum possible extent". The court stated that the Basic Law aims to integrate Germany into the legal community of peaceful and free states, but it does not waive the sovereignty ultimately provided for by the German constitution. That is, the Constitutional Court emphasized the importance of the German sovereignty, asserting that the Constitution takes precedence over international obligations.

A similar approach was used by the Constitutional Court of the Italian Republic, by rejecting the conclusions concerning the retirement payments, that were formulated in the judgement of ECHR with regard to case of *Maggio and Others v. Italy* of 31 May 2011¹².

The Constitutional Court of the Italian Republic stated in its ruling as of 19 November, 2012 with regard to case N 264/2012, that compliance with international obligations can not be the cause of lowering the level of protection of

rights envisaged already in the internal legal order, and on the contrary, may and should represent an effective tool of extension of that defence; as a consequence, the contradiction between the protection provided by the Convention on Human Rights and Fundamental Freedoms and the constitutional protection of fundamental rights must be resolved in the direction of maximum extension of guarantees and with a view of securing proper conformity with other interests defended by the Constitution. The Constitutional Court of the Italian Republic took its final decision on the priority of constitutional norms on 22 October, 2014. The resolution states that a decision of an international judicial body, in the event of conflict with the basic constitutional principles of the Italian law, makes any acceptance impossible in the context of article 10 of the Italian Republic's Constitution. The limits of the Constitutional Court's resolution on declaring a law unconstitutional are of erga omnes character. The retroactivity principle lies in that the law declared unconstitutional does not have legal consequences and becomes null and void from the day following the day of publication of the court's resolution (article 136 of the Constitution of the Italian Republic, in conjunction with article 1 of the Constitutional Law 1948 N 1 and article 30 (3) of the Law N 87/1953)¹³.

The Constitutional Court of the Republic of Austria, recognizing the importance of the Convention on Human Rights and Fundamental Freedoms and ECHR rulings based on it, also came to the conclusion on inexpediency of enforcement of the Convention's provisions in the interpretation of ECHR, that are contrary to the national constitutional law (enactment as of 14 October, 1987 with regard to case N B267/86).

Importantly, the ECHR judges noted in the case of *Frodl v. Austria* that any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates. Exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of Article 3 of Protocol No. 1. This standard of tolerance does not prevent a democratic society from taking steps to protect itself against activities intended to destroy the rights or freedoms set forth in the Convention Article 3 of Protocol No. 1.

The Court points out that Article 3 of Protocol No. 1 does not, as other provisions of the Convention, specify or limit the aims which a

restriction must pursue. A wide range of purposes may therefore be compatible with Article 3 (see, for example, *Podkolzina v. Latvia*)¹⁴.

For example, in the case of *Podkolzina* the Court considers that the interest of each State in ensuring that its own institutional system functions normally is incontestably legitimate. That applies more to the national parliament, which is vested with legislative power and plays a primordial role in a democratic State. Similarly, regard being had to the principle of respect for national characteristics enunciated above, the Court is not required to adopt a position on the choice of a national parliament's working language. That decision, which is determined by historical and political considerations specific to each country, is in principle one which the State alone has the power to make¹⁵.

The Supreme Court of the United Kingdom of Great Britain and Northern Ireland in its resolution of 16 October, 2013 (UKSC 63) pointed out the unacceptability for the British legal system of the conclusions and construction of the Convention on Human Rights and Fundamental Freedoms, as interpreted in the ruling of ECHR of 6 October, 2005, with regard to case of *John Hirst v. the United Kingdom*¹⁶ relative to the problem of prisoners' electoral rights. The Court has had frequent occasion to highlight the importance of democratic principles underlying the interpretation and application of the Convention and it would take this opportunity to emphasise that the rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law.

This standard of tolerance does not prevent a democratic society from taking steps to protect itself against activities intended to destroy the rights or freedoms set forth in the Convention. Article 3 of Protocol No. 1, which enshrines the individual's capacity to influence the composition of the law-making power, does not therefore exclude that restrictions on electoral rights could be imposed on an individual who has, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations.

The author points out that in discussion of the case of *Hirst v. the United Kingdom* the Latvian Government were concerned that the Chamber's judgment would have a horizontal effect on other countries which imposed a blanket

ban on convicted prisoners voting in elections. They submitted that, in this area, States should be afforded a wide margin of appreciation, in particular taking into account the historical and political evolution of the country and that the Court was not competent to replace the view of a democratic country with its own view as to what was in the best interests of democracy.

According to the Forfeiture Act 1870, all the prisoners were denied the right to vote. For 142 years the prisoners were not allowed to vote, but ECHR passed its own judgement and reminded the member-states once again that the tacit and indiscriminate deprivation of voting rights infringes the Convention. The author refers to the statistics given by the Court relative to the voting right granted without restriction to prisoners, adopted in 18 countries.

According to the Government's survey based on information obtained from its diplomatic representation, eighteen countries allowed prisoners to vote without restriction (Albania, Azerbaijan, Croatia, the Czech Republic, Denmark, Finland, "the former Yugoslav Republic of Macedonia", Germany, Iceland, Lithuania, Moldova, Montenegro, the Netherlands, Portugal, Slovenia, Sweden, Switzerland and Ukraine)¹⁷.

In the case of *Markin v. Russia*, ECHR established violation of article 8 and article 14 of the Convention by Russia. In considering this case, the Constitutional Court of the Russian Federation announced its ruling with regard to the case of collision between its own judgements and the judgements of ECHR. In Russia, the RF Constitution has legal supremacy, while the exclusive right of interpretation and enforcement of the RF Constitution is the prerogative of the Constitutional Court of the Russian Federation; therefore its decisions have the inherent supreme legal effect as well.

According to article 15, the Russian Federation Constitution has the supreme legal force, immediate effect, and is enforced on the entire territory of the Russian Federation. The laws and other legal acts adopted in the Russian Federation must not contradict the Russian Constitution.

With regard for the best practices of the constitutional proceedings, including Germany, Britain, Italy and Austria, and the full compliance of the Constitution, the Constitutional Court of the Russian Federation on 14 July 2015 recognized the supremacy of the Constitution of the Russian Federation in enforcement of ECHR judgements. At the same time, the participation of the Russian

Federation in the international treaty does not imply waiver of the national sovereignty, but the Convention and the legal positions of ECHR based on it may not override the priority of the Constitution. The Constitutional Court enacted that if the Constitutional Court of the Russian Federation comes to the conclusion that an ECHR resolution based on the Convention on Human Rights and Fundamental Freedoms, interpreted contrary to the RF Constitution, may not be enforced, such resolution is not enforceable to this specific extent.

On 4 December 2015 the State Duma of the Russian Federation approved a law granting a right to the Constitutional Court of the Russian Federation to decide whether or not to enforce the verdicts of interstate bodies for protection of rights and freedoms, including Resolutions of ECHR passed within the framework of complaints against Russia. That is, the Constitution of the country has the absolute priority over other laws, including the international law that is nothing more than its complementation.

The author points out that in all of the above references it is not a matter of contradiction between the Convention and the national constitutions, but a conflict of interpretation of the Convention's provision as given by ECHR in a particular case, the general principles of law recognized by civilized countries and the provisions of national Constitutions.

Recognition by the European Court of human rights violation in a particular case is a due practice. And a different thing is the demand on the part of ECHR to change the legislation in accordance with the general recommendations addressed by ECHR to a national legislation.

Accordingly, a conclusion of ECHR on incompatibility of any provisions of the member-state's legislation with the obligations under the Convention – including with regard for the assessment given to these provisions earlier by the Constitutional Court of the Republic of Latvia and the Supreme Court of the Republic of Finland – may not be regarded as absolutely binding to take general measures to amend the legal regulation in these countries.

This is contradicted to as well by the earlier judgements of ECHR made in 1997–2010, in which the Court repeatedly voiced in the period 1997–2010, that it is in the first place for the domestic authorities, notably the courts, to interpret and apply the domestic law and to decide on issues of constitutionality. The author emphasizes that these judgements were passed

in cases versus Germany and Spain, where the Constitutional courts emphasize the state sovereignty and the Constitution takes precedence over the international obligations¹⁸.

A different approach could lead to diminution of the importance of the Constitution as the act of supreme legal force valid on the territory of the country, and therefore – to undermining the foundations of the constitutional system and, in particular, the state sovereignty.

In the course of preparation of this Doctoral thesis, the author posed a number of questions, in particular, to the judges of the Supreme Court and the Supreme Administrative Court of the Republic of Finland.

The best comment to the position of the Supreme Court of Republic of Finland is contained in the answer to the questionnaire as of 28 December 2015 of the former President of the Supreme Court of the Republic of Finland Pauliine Koskelo and a ECHR judge from Finland since 1.1.2016¹⁹. According to the ECHR judge, the Supreme Court's position is based on 13 legal precedents of the court within the period 2009–2015, reported to the author of the Doctoral thesis in response to the questionnaire. In her reply Pauliine Koskelo states that the best answers to the posed questions may be found in the study of the above judgements. Many of them encompass the relationship between the national laws and the European Convention. Judge Pauliine Koskelo notes that this judgement list is not exhaustive.

On 10.1.2016, an article of the former President of the Supreme Court Pauliine Koskelo entitled “The Supremacy of Law in Finland is jeopardized” was published as well. In accordance with the Constitution, the national rules must protect human rights and promote justice in the society. ECHR has repeatedly stressed that the member states have an obligation to organize their judicial system in such a way that the courts might enforce any of its requirements under the conditions of fair trial.

“It is quite obvious that this approach has not been observed in Finland. First, we need to carry out reforms that will lead to cost reduction and streamline operation. In Finland, the Government has cut the funding, in the first place, therefore the requirements of fair trial are not always met”²⁰.

The fullest attention to the supremacy of the Constitution was given by the Supreme Court of the Republic of Finland in the judgement KKO:2015:14 (the author analyzes this solution in more detail in Chapter 2.2.). The Supreme Court noted that § 106 of the Constitution does not provide for enforcement of the Constitution only in cases involving exceptional circumstances. The provision on fundamental rights of citizens is applied in the updated articles of the Constitution in terms of international obligations in the sphere of human rights, with the supremacy of the Constitution. § 106 of the Constitution rules that if, upon consideration of a case by court, the enforcement of a provision of law would be in evident contradiction with the Constitution, then the court must give preference to the Constitution. This obligation applies to all judicial proceedings²¹.

The research and analysis of legal practice make it possible to conclude that enforcement of laws at the state level is a prerogative falling under the competence of every sovereign state based on the Constitution.

The author notes that the Constitutional Court of the Republic of Latvia has not always accepted the position of ECHR as well. For example, the Constitutional Court of the Republic of Latvia disagrees with the opinion of the Saeima regarding the restricted freedom of action of the legislator. Consequently, there is no reason to apply the term of “freedom of action” in the meaning provided by the ECHR to the legislator in case if a constitutional court assesses lawfulness of activities taken by the legislator in the case of expropriation of real property²².

References

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- ² Giancarlo Parretti v. United States. 112 F. 3d 1363. U.S. Court of Appeals, 9th Cir. , May 6, 1997.
- ³ Bederman David J. International Law Frameworks. New York, 2001. P. 158.
- ⁴ United States Court of Appeals, District of Columbia Circuit. Argued Nov. 13, 1987.
- ⁵ Henkin L. International Law as Law in the United States, 82 Mich.L.Rev. 1555, 1565 n. 34 (1984) noting that in several European countries treaties prevail over all inconsistent statutes.

- ⁶ Henkin L. United States Sovereignty, 100 Harv.L.Rev. at 870.
- ⁷ Italian Constitutional Court, June 27, 1996, Venezia v. Ministero di Grazia e Giustizia. Judgment No.223. Rivista di Diritto Internazionale 815.
- ⁸ Осминин Б.И. Заключение и имплементация международных договоров и внутригосударственное право. Инфотропик, 2010. ISBN 978-5-9998-0005-3; 2010.
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- ¹⁰ Case of Görgülü v. Germany, Application no. 74969/01, 26 February 2004.
- ¹¹ German Federative Constitutional Court October 14, 2004. Judgment in the case 2BVR 1481/04.
- ¹² Case of Maggio and Others v. Italy, Applications nos. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, 32 May 2011. <http://hudoc.echr.coe.int>.
- ¹³ Case of Scordino v. Italy (№ 1), pp. 51. 29 March 2006, № 36813/97.
- ¹⁴ Case of Frodl v. Austria. Application 20201/04. 8 April 2010, para 24. <http://hudoc.echr.coe.int>.
- ¹⁵ Podkolzina v. Latvia, no. 46726/99, 9 April 2002, para 34. <http://hudoc.echr.coe.int>.
- ¹⁶ Case of Hirst v. the United Kingdom (no. 2). Application no. 74025/01. 6 October 2005, para 71.
- ¹⁷ Ibid., para 33.
- ¹⁸ Case of Forrer-Niedenthal v. Germany, no. 47316/99, § 39, 20 February 2003; Case of Wittek v. Germany, no. 37290/97, 12 December 2002; Case of Jahn and Others v. Germany, nos. 46720/99, 72203/01 and 72552/01), 30 June 2005; Case of Glässner v. Germany, no.46362/99, 28 June 2001; Case of Brualla Gómez de la Torre v. Spain, 19 December 1997.
- ¹⁹ President of the Supreme Court of Finland from 2006–2015, a judge of the Supreme Court with the years 2000–2006. Since January 2016 the judge of the ECHR from Finland.
- ²⁰ Helsingin Sanomat, 10 January 2016. The supremacy of law is under threat in Finland.
- ²¹ KKO:2015:14. Judgment of Supreme Court of Finland, para 35.
- ²² Judgment of the Constitutional Court in the case No.2009-01-01, para 12.2.

Anotācija

Daudzās valstīs ir noteikts, ka Konstitūcija ir nozīmīgākais tiesību akts un starptautiskās saistības nevar ietekmēt Konstitūcijas demokrātisko pamatu. Cilvēktiesību garantēšana ir demokrātiskas valsts pamatprincips, kā arī tiesiskas valsts elements. Cilvēka tiesību un pamatbrīvību aizsardzības konvencijas preambulā noteikts, ka šīs pamatbrīvības vislabāk var nodrošināt ar efektīvas politiskas demokrātijas palīdzību. Analizējot Satversmes tiesas un Somijas Augstākās tiesas spriedumus, secināts, ka Konstitūcijai ir prioritāra nozīme, ja Cilvēka tiesību un pamatbrīvību aizsardzības konvencijas normu interpretācijas gaitā radušās konstitucionāli - tiesiskas kolīzijas.

Аннотация

Верховенство Конституции закреплено во многих государствах, и международные обязательства не должны создавать угрозу демократическим основам Конституции. Обеспечение предоставления прав человека является одним из основных принципов демократического государства, а также одним из элементов правового государства. В преамбуле к Конвенции о защите прав человека и основных свобод говорится, что уважение прав человека и основных свобод лучше всего может быть достигнуто путем эффективной политической демократии. Из проведенного анализа решений Конституционного суда Латвийской Республики и Верховного суда Финляндии сделан вывод о приоритете Конституции при разрешении конституционно-правовых коллизий, которые могут возникнуть в связи с толкованием Конвенции о защите прав человека и основных свобод.