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ПРАКТИКА ЗАСТОСУВАННЯ МІЖНАРОДНИХ ПРИНЦИПІВ У ПРИВАТНОПРАВОВИХ ВІДНОСИНАХ

Анотація. *Національні та міжнародні суди все частіше звертаються до загальновизнаних міжнародно-правових принципів для регулювання приватноправових відносин. Це зумовлено, зокрема, тим, що питання та спори, з якими сучасні учасники приватноправових відносин звертаються до суду, набувають все більшого поширення. Таким чином, практика міжнародного правосуддя та правосуддя в Україні демонструє, що у вирішенні спорів все частіше використовуються такі міжнародні принципи, як принцип справедливості, рівності, недискримінації, еволюційного тлумачення, пропорційності, правової визначеності, верховенства права. Це дослідження досліджувало застосування міжнародних принципів у приватноправових відносинах. На основі загальноправових методів дослідження проаналізовано природу міжнародно-правових принципів, розглянуто їх застосування у вищезгаданих українських судових справах до Європейського суду з прав людини, а також до Конституційного та Антикорупційного судів України. У дослідженні досліджувалася судова практика Європейського суду з прав людини, рішення якого порушують питання порушення прав і основних свобод, закріплених у Конвенції про захист прав людини і основоположних свобод, та недотримання основних міжнародно-правових принципів, о. а також висвітлено основні тенденції цих суперечок. За результатами аналізу дослідження виявило недостатній рівень конкретизації змісту щодо принципу верховенства права та його особливостей у чинному законодавстві України, якого мають належно дотримуватись як органи державної влади, так і громадяни України. На основі проведеного дослідження автори сформулювали свої наукові позиції та висновки, спрямовані на вдосконалення системи засад приватноправових відносин*

Ключові слова: *принципи міжнародного права, Європейський суд з прав людини, верховенство права, судова влада*

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PRACTICE OF APPLYING INTERNATIONAL PRINCIPLES IN PRIVATE LAW RELATIONS

Abstract. *National and international courts are increasingly turning to generally recognised international legal principles to regulate private law relations. This is necessitated, in particular, by the fact that the issues and disputes that modern participants in private law relations address to the courts are becoming more widespread. Thus, the practice of international justice and justice in Ukraine demonstrates that such international principles as the principle of justice, equality, non-discrimination, evolutionary interpretation, proportionality, legal certainty, and the rule of law are increasingly used in dispute resolution. This study investigated the application of international principles in private law relations. Based on the general legal research methods, the nature of international legal principles was analysed, the study considered their application in the above-mentioned Ukrainian court cases to the European Court of Human Rights, as well as the Constitutional and Anti-Corruption Courts of Ukraine. The study investigated the judicial practice of the European Court of Human Rights, whose decisions raise the issue of violation of rights and fundamental freedoms stipulated in the Convention for the Protection of Human Rights and Fundamental Freedoms and non-compliance with basic international legal principles, as well as highlighted the main trends of these disputes. Based on the results of the analysis, the study identified an insufficient level of the content specification regarding the principle of the rule of law and its features in the current legislation of Ukraine, which must be properly observed by both state authorities and citizens of Ukraine. Based on the conducted research, the authors formulated their scientific positions and conclusions aimed at improving the system of principles of private law relations*

Keywords: *principles of international law, the European Court of Human Rights, the rule of law, the judiciary*

INTRODUCTION

The expansion of the practice of applying international legal principles occurs by adapting them to the conditions of the international legal order. In all branches of private law, the tasks and functions of international legal principles are common. These include promoting the fundamental unity, internal integrity, and consistency of legal regulation, which form the basis for both law-making and law enforcement activities. While on the subject of the mechanism for implementing international legal principles, it should be noted that it manifests itself in two main aspects of influence: the first is that international principles can directly regulate particular relations of private law subjects, and the second is that they have an important influence in national and international law-making as a determining criterion of legality.

In the institutional mechanism for implementing the principles of private international law, the main role is played by the justice system. Therewith, this refers to the international and national justice. The practice of the European Court of Human Rights as an international court and the practice of the Supreme Court of

Ukraine as a national court demonstrates that increasingly and more decisions are made based on the principles of international law, as well as universal principles [1]. The system of sources and principles of the national legal system and the international legal system is changing under the influence of globalisation processes. The emergence of modern global issues requires joint efforts to solve them at the international level through legal integration, internationalisation or legal implementation [2].

An important aspect in globalisation is the role of general principles of international law as fundamental factors for the coexistence of national legal systems and the international legal order [3]. It is most clearly manifested in the aspect of general principles: the general principles of international law have become fundamental for all national legal systems of the world, and the general principles of law have become the legal basis for the international legal system [4], which also seeks a way to fill in the gaps in the general substantive and procedural principles of national legal systems. The principle of non-interference in internal affairs is becoming more open, and the principle of protecting human rights has ceased to be a purely internal matter of the state, provided that the principle of sovereignty and territorial integrity is respected.

The provisions of the international and national legal systems have different social and legal essence, so they cannot be hierarchically dependent on each other, they act in the legal system where they exist, and can closely interact between their elements. The general principles of international law have an impact on the international legal system and the national legal system, as they occupy a separate place in the international legal system and are important in the national legal system [5].

Thus, *the purpose of the study* was to investigate the application of international principles in private law relations.

1. MATERIALS AND METHODS

The mechanism for implementing international legal principles consists of three levels:

1. National level. This includes the interaction of international and national law, the recognition of the primacy of international law, international legal principles as the basis of the legal system, as well as the implementation and enforcement of international law. Their interaction is carried out by sending, reception and transformation. Referral is divided into general and special, and is used in a conflict, when the disposition does not contain a specific rule of conduct. At the reception, the international legal norm is literally reproduced in the act of national law. Reception is understood as the perception, recognition and approval by the national legal system of international legal norms and principles (consolidation of normative legal regulations on human rights and freedoms contained in the main international legal acts). Transformation is a way of exercising international rights and obligations through the issuance of legal acts in domestic law.

2. The supranational level is the process of implementing international legal principles within the framework of European Union law, in which they are recognized as the main sources of the legal system of the European Union.

3. The international level concentrates the mechanism of ensuring and implementing international legal principles in the international legal order.

Each level is characterized by legal, political and moral methods of implementing international legal principles. This is primarily due to internal needs and peculiarities of the legal system.

The legal method is characterized by the normative consolidation of international legal principles at all levels and ensuring their observance and implementation by all subjects of law. Political is characterized by the presence of various political acts at all levels. The moral and ethical method is characterized by the impact on the legal consciousness of legal entities at all levels, depending on the existing legal situations [6; 7].

In carrying out this study, the following scientific methods were used: dialectical – to establish the basic patterns and features inherent in international principles and their application in private law relations; system analysis – to determine the place of the principles of international law in judicial practice in resolving private law disputes; comparative analysis – to identify common and different features in the legal regulation; abstraction and generalization – to formulate a definition of the principles of private international law; method of historical analysis – to establish the evolution of the application of international principles in judicial practice, regulation of private law relations; formal-legal – to analyze the content of international legal principles.

2. RESULTS AND DISCUSSION

2.1. Impact of international legal provisions on the activities of justice bodies

The fundamental principle of international law that describes the pan-European legal culture is the principle of respect for human rights and freedoms. This principle is also guaranteed by numerous other principles. These include the principle of the rule of law and the principle of legality, the principle of justice and reasonableness, the principle of good faith, the principle of democracy, the principle of the rule of human rights, the principle of humanism, the principle of legal equality, the principle of responsibility [8; 9]. Civil procedure principles also play a particularly important role. These are, in particular, the right to a fair trial and the principle of transparency, which are stipulated in Articles 6 and 40 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms [10-12].

The principle of respect for human rights and freedoms, in particular, corresponds to other private law principles. In particular, Article 8 of the Convention stipulates that everyone has the right to respect for their private and family life, their home, and correspondence. Public authorities may not interfere in the exercise of this right unless the interference is in accordance with the law and is necessary in a democratic society in the interests of national and public security or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

When resolving the dispute concerning the loss of the right to use housing in case No.760/6998/19 of February 16, 2021, the Supreme Court of Ukraine was guided in its judgement, among other things, by international principles and noted that "the European Court of Human Rights in the ECHR Judgment of December 2, 2010 in the case "Krivitskaya and Krivitsky v. Ukraine", application No. 30856/03 indicated that "loss of housing is the most extreme form of interference with the right to respect for housing". State interference is in breach of Article 8 of the Convention if it does not pursue a legitimate purpose, one or more listed in Paragraph 2, Article 8, is not carried out "in accordance with the law" and cannot be considered as "necessary in a democratic society..." [13]. It is the judicial authorities that guarantee compliance with international legal principles. At the international level, these guarantors are the International Court of Justice and the European Court of Human Rights [14], which engage in their activities according to the principle of fairness [15]. In practice, they are guided by the facts of the case. Fairness is a necessary element of justice. In modern law, it is endowed with the following features:

a) acts as a supporting component of the principle of the rule of law, which determines the main role of law in public life;

b) acts as a principle of all judicial bodies, based on which the court's activities are performed, and legal cases are resolved;

c) procedural legislation aims to ensure that justice is fair;

d) a mandatory element of the content of a court decision, which reflects the result of the court's activities to protect and restore the violated right or interests of society from illegal encroachments;

d) an important criterion for evaluating the effectiveness and legitimacy of the judiciary [16; 17].

According to Paragraph 1, Article 6 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, it is stated that anyone who resolves a dispute concerning their rights and obligations of a civil nature has the right to a fair and public hearing of their case within a reasonable time by an independent and impartial court established by law or to establish the validity of any criminal charge brought against them.

That is, the European Court of Human Rights has identified four mandatory components of a fair trial [18]. The first component is the right of citizens to judicial protection, access to justice and enforcement of decisions. The second component is described by the fact that each judicial body, as well as the judicial system in general, must be independent and impartial. Independence is manifested in the fact that other branches of government have no influence on the court in any way. The impartiality of the court means the absence of bias and prejudice. The third component is the fact that there is an adversarial nature of the process, which ensures the real participation of a person or participation through a representative in the consideration of a particular court case. And the fourth component is certain guarantees, which include, most importantly, the presumption of innocence, which is covered in Part 2, Article 6 of this Convention and the rights of the accused under Part 3 of the same Article.

The judiciary combines international legal provisions and international legal principles to deliver a fair judgement [19]. This principle is crucial in resolving private law disputes. Thus, when considering the claim for declaring illegal and cancelling the order for dismissal, reinstatement, and payment of average earnings for the period of forced absenteeism in case No. 372/4328/19 of February 15, 2021, the Supreme Court was guided

by the principle of fairness and practice of the European Court of Human Rights. In this decision, the Supreme Court noted: "The European Court of Human Rights (hereinafter referred to as "the ECHR") emphasises that the right of access to a court must be effective. By implementing Paragraph 1, Article 6 of the Convention, each Member State to the convention has the right to establish rules of judicial procedure, including procedural prohibitions and restrictions, the meaning of which is to prevent the trial from proceeding randomly.

Therewith, there should not be too formal an attitude towards the requirements stipulated by law, since access to justice should not only be factual, but also real (§ 59 of the ECHR Judgment in the case "De Geouffre de la Pradelle v. France" of December 16, 1992, application No.12964/87). In § 36 of the Judgment in the case of Bellet v. France" of December 4, 1955, application No. 23805/94, the ECHR noted that "Article 6 of the Convention contains guarantees of a fair trial, one of the aspects of which is access to a court. The level of access afforded by national law must be sufficient to ensure the individual's right to a court, considering the principle of the rule of law in a democratic society. For access to be effective, a person must have a clear practical opportunity to challenge actions that constitute interference with their rights" [20].

If past practice is any guide, it can be seen that international legal principles have a greater impact on a person's legal consciousness than international legal provisions. All actors of the international community, universally, are obliged to exercise their rights and obligations within the limits within which it is permissible, so as not to violate international peace and basic international legal principles in all areas of coexistence [21].

2.2. Legal analysis of court decisions on the application of international principles of private law

According to Article 17 of the Law of Ukraine "On the Enforcement of Decisions and Application of the Practice of the European Court of Human Rights", it is stated that courts consider the Convention for the Protection of Human Rights and Fundamental Freedoms and the practice of the ECHR as sources of law. And Article 18 of this Law defines the procedure for referring to this Convention and the practice of the Court [22; 23]. The practice of the Court, proceeding from Article 1 of this Law, refers to the practice of the European Court of Human Rights and the European Commission on Human Rights. Several decisions of the European Court of Human Rights concerning the rule of law should be considered. This principle concerns the requirements of the quality of the law and its legal certainty. It requires compliance with laws that relate to human rights and fundamental freedoms.

According to the case of "Mykhailiuk and Petrov v. Ukraine" [24] of 10 December 2009: citizens of Ukraine lodged an individual application with the court on 24 November 2001, guided by Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms, according to which the court may accept applications from any person, non-governmental organisation or group of persons who consider themselves victims of a violation of the rights set out in the Convention or its protocols committed by one of the High Contracting Parties. The High Contracting Parties undertake not to interfere in any way with the effective exercise of this right. Nevertheless, the court declared the application partly inadmissible and communicated it to the government. The applicants' complaint was based on the unlawful inspection of their correspondence by the state authorities. At the same time, the question of the admissibility and merits of the said application and fundamental rights and freedoms under the Convention arose. And following the referral of the application to the government, the applicants lodged another individual application with the Court, which was based on the unlawful release of one of the applicants, as well as on the persecution of the second applicant by the authorities while he was working in the Black Sea correctional colony. The court, after reviewing the application, concluded that the following application is not a clarification of the previous one, so they should not be considered separately.

The applicants complained about the exposure of their correspondence by public authorities, namely prison staff, which is a clear violation of Article 8 of this Convention, which states that everyone has the right to respect for their privacy and family life, for their home, and correspondence. And according to Part 2 of this Article, public authorities may not interfere in the exercise of this right unless the interference is in accordance with the law and is necessary in a democratic society in the interests of national and public security or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The Court found that the opening of the letter alone was sufficient to establish an interference with the applicant's right to respect for correspondence. The national court also deduced this, but the court had to confirm whether such treatment by the applicants was in accordance with Article 8 of the Convention, whether it was "in accordance with the law", that is, whether the principle of the rule of law was in breach. Analysing the foregoing, the Court noted that the expression "in accordance with the law" primarily required that the impugned interference had a certain basis in national legislation. The corresponding legislative provision

should be accessible to the person concerned, who, furthermore, should foresee its consequences for themselves, and this legislation should also comply with the principle of supremacy.

The national courts, guided by Article 7 of the Law of Ukraine "On Pre-Trial Detention" of 1993, established the legality of the actions of employees of the colony because according to this Article, the inspection of the correspondence of a certain category of persons was provided for, namely regarding the persons taken into custody or persons serving sentences in institutions of the penitentiary system. However, the Court found that these persons did not serve their sentences in the colony, so they cannot be placed in the specified category of persons. Consequently, the application was declared admissible [24].

As an example of a violation of the principle of legal certainty and the principle of equality of arms, it is worth considering the case "Ustimenko v. Ukraine", the final decision on which was made on January 29, 2016. The applicant's claim referred to a violation of fundamental rights and freedoms guaranteed by the convention, namely, he had not been duly notified of the appeal proceedings in his case, and that the reinstatement of the time-limit for appeal and the cancellation of the final court order issued in his favour. Thus, the principle of legal certainty was violated.

The government argued that the applicant had been informed about the appeal proceedings by sending him summonses, but failed to provide evidence supporting the sending of these summonses, arguing that the storage period for registers of sent correspondence had expired. The prosecutor's office also found that the applicant had missed the time-limit for lodging an appeal, as he had received a copy of the decision with a certain delay, and therefore the court of appeal had good reasons to resume the time-limit for appealing. The prosecutor's office also established the presence in the case file of subpoenas addressed to the applicant with copies of the defendant's appeal. The national courts agreed with those findings of the prosecutor's office. Accordingly, the government pointed out that the national courts had carefully examined the applicant's complaint and found that the facts cited by the applicant were untrue and that the applicant's complaint was completely unfounded.

Having analysed all the circumstances of the case, the court concluded that if the usual time limit for appeal is resumed after a considerable period of time, then such a decision may violate the principle of legal certainty. The national courts were empowered to decide on the renewal of the time-limit for appeal, but they had to provide reasoning for such decisions by ascertaining whether the reasons for such renewal were consistent with the principle of the immutability of the judgement. The court of appeal found that the delay in obtaining a copy of the district court's decision was a valid reason. However, neither party to the dispute cited this fact as a reason for resuming the appeal period. Therefore, this reason has nothing to do with the decision to restore the missed deadline, since according to national legislation, the appeal period is counted from the moment when the person filing the complaint actually receives a copy of the decision. As a result of the administration of justice, the Court declared the applicant's complaint admissible and cancelled the decision to renew the term of appeal [25]. The Constitutional Court of Ukraine also acts as a guarantor of compliance with international legal principles in national law. It defines that the main area of ensuring the independence of the judiciary is the creation of special institutions to protect and strengthen the judiciary in relations with the executive and legislative authorities.

According to Paragraph 7 of the Preamble of the Recommendation of the Committee of Ministers of the Council of Europe of 17 November 2010, it is stated that the independence of the judiciary ensures everyone's right to a fair trial and is therefore not a privilege of judges, but a guarantee of respect for human rights and fundamental freedoms, which allows everyone to feel confidence in the judicial system [26]. Paragraph 4 of the Annex to this Recommendation establishes that the independence of judges is guaranteed by the independence of the judiciary in general. This is a fundamental principle of the rule of law. Thus, the independence of the judiciary is an important component of the rule of law and ensures everyone the right to a fair trial, emphasising respect for human rights and freedoms. External independence does not grant any privileges to satisfy the judges' interests. Judges operate only in the interests of the rule of law and those who await an impartial judgement to remedy their violated rights.

Paragraph 2.04 of the Montreal Universal Declaration on the Independence of Justice, adopted at the First World Conference on the Independence of Justice in Montreal in 1983, guarantees that the judiciary is independent of the executive and legislative branches of government [27]. All state institutions shall be obliged to respect such independence of the court, including not to allow any restrictions, any influence, pressure, threats, interference by any persons, regardless of the reason. Admittedly, there should be an anti-corruption policy that guarantees protection of individuals from violating the principle of independence of the judiciary and compliance with the principle of constitutionality [28]. It makes provision for the prosecution of judges with the expectation that the disciplinary authorities should be independent of the government, namely the proceedings for the recusal of a judge should be conducted in accordance with legislation and established

procedures [29]. Anti-corruption reform in Ukraine is a public requirement that guarantees the right to fair, transparent, and independent consideration of cases.

In its decisions, the European Court of Human Rights stressed the importance of the principle of independence of the court and non-interference of other branches of government in the affairs of the judicial branch, which ensures the impartiality of the court. These are, in particular, the decisions in Ringeisen v. Austria, Sasilor-Lormin v. France, Stafford v. the United Kingdom. Of particular importance was the decision of the European Court of Human Rights in the case "Volkova v. Ukraine" [30]. According to this case, the applicant was unlawfully dismissed from his position as a judge for breach of oath in the midst of a "judicial reform" that was taking place in June 2010. O. Volkov appealed against his dismissal to the Supreme Administrative Court of Ukraine, however, refused to satisfy the requirements to recognise and cancel the corresponding acts of the High Council of Justice and acts of the Verkhovna Rada of Ukraine. Therefore, he filed an application with the European Court of Human Rights, claiming that he was released in violation of the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as the Constitution of Ukraine and laws of Ukraine.

In turn, the European Court of Human Rights ruled that Volkov's dismissal was illegal, ruling that the decision of the Ukrainian authorities to dismiss Volkov was in violation of such international legal principles as an independent and impartial trial, legal certainty, respect for privacy under Articles 6 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. As a result of all these circumstances, the Court found that the domestic authorities had failed to ensure an independent and impartial hearing of the applicant's case and there had been a clear violation of the Convention for the Protection of Human Rights and Fundamental Freedoms, namely Paragraph 1, Article 6 of the Convention.

CONCLUSIONS

These examples of application of the principles of private international law demonstrate that the current legislation of Ukraine does not specify the content of the rule of law, which comprises many important components, and there is no clear specification of its features, which must be properly observed by both public authorities and citizens of Ukraine. Therefore, the authors of this study believe that other requirements for compliance with the rule of law should also be considered. It is necessary to refer to the practice of the European Court of Human Rights, which sets out such requirements to ensure equality of all legal subjects before the law.

Notably, the principles of international law function only in interaction, that is, they are complex in nature and interconditional, which is generally accepted. In their application, the principles of international law are described by different nature of binding, they can be both imperative and dispositive (by mutual consent, the possibility of deviation from the rule is allowed without abusing the mandatory principles and provisions of international law). But together they form an integral system that constitutes the foundation of all private international law.

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