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EUROPEAN HUMAN RIGHTS STANDARDS: THE PRACTICE OF APPLYING ECTHR DECISIONS

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Abstract

Given the need to bring Ukrainian law in line with the norms and principles of international law, it is important to study European legal experience and European legal doctrine. The purpose of the article is to study the current problems of using the legal positions of the ECtHR in the decisions of Ukrainian courts. The study found that despite the legal consolidation of the status of ECtHR decisions as a source of law in Ukraine, the reasons that hinder the proper application of ECtHR practice are the lack of a systematic and well-established methodology for motivating court decisions using effective interpretative interpretation of ECtHR on specific decisions.The need to develop practical recommendations and methods of direct use of the practice of the Strasbourg court in the decisions of Ukrainian courts is pointed out. The methodological basis of the study is a dialectical method of cognition, which allows to explore problems in the unity of their social content and legal form, logical-semantic method, method of synthesis, system-structural method, sociological and statistical method and others. The practical significance of the obtained results is determined by the ability to increase the role of ECtHR decisions in ensuring human and civil rights in a democratic society.

Keywords: human rights; human rights protection; judicial decision; lawfulness; right to a fair trial.

I. INTRODUCTION

The urgency of this topic is due to the fact that in recent years Ukraine has increasingly turned to the European Court of Human Rights (ECtHR) and uses its practice in its internal affairs. In connection with the processes of integration and globalization, the issue of using the legal positions of the ECtHR in the judiciary of Ukraine has recently become more acute. Effective protection of human rights is one of the main features of the rule of law. Issues related to the work of the ECtHR are becoming more and more widespread in the media. For many years, the relevance of the Court's work has not diminished, but rather increased. Today, the ECtHR has become a reliable tool for the protection of human rights, given the fairness of their protection.

It is worth noting the increasing trend in the number of complaints filed with the ECtHR against Ukraine. This testifies to the dynamism of democratic processes given the low efficiency of the national system of legal protection of human rights. This is primarily due to the imperfection of

judicial protection and the problem of a general crisis of public confidence in government institutions, in particular in the activities of law enforcement agencies and the court. All over the world, the ECtHR has long been a model of justice and the last resort to restore violated rights. Everyone who has lost hope for justice in their country applies to the ECtHR. In general, the significance of ECtHR decisions is difficult to overestimate. For most applicants, the possibility of recourse to the ECtHR was the only way to combat the imperfections of the national justice system. For practitioners, ECtHR decisions have become a "litmus test" for identifying systemic problems and at the same time setting human rights standards to strive for.

Considering this issue, we will focus on issues related to the implementation of ECtHR precedents in the national legislation of Ukraine. The study of this issue is quite relevant, because the conclusions drawn from our work can be taken into account in further theoretical developments in the field of justice, aimed at improving the effectiveness of judicial protection of human rights, and in improving the practice of Ukrainian courts. The achieved results are of both scientific-theoretical and practical interest: in the research sphere - provisions and conclusions can be the basis for further development of the mechanism of ensuring human and civil rights in a democratic society; in law-making - as a result of the conducted research the offers on perfection of the existing system of the legislation are formulated; in law enforcement - the use of the results will improve the legal guarantees of human rights protection in Ukraine. Many scientific works, including such scholars as, O.O. Barabash /**1**/, /**2**/, O. Butkevich /**3**/, V.M. Kravchuk /**4**/, T. Pavlyukovets /**5**/, S.V. Senik /**6**/ are devoted to this topic. The purpose of this article is to identify problematic issues in the application of the case law of the ECtHR in national courts, to identify negative factors that hinder its effective and correct use at the national legal level, and to develop ways to eliminate them.

II. MATERIALS AND METHODS

The methodological basis of the study is a set of methods and techniques of scientific knowledge. The main in this system is the worldview dialectical method of cognition, which allows to explore the problems in the unity of their social content and legal form, to carry out a systematic analysis of the practice of applying ECtHR decisions from the angle of theoretical and legal dimension. With the help of the logical-semantic method the conceptual apparatus of the research is deepened. The method of synthesis made it possible to supplement the categorical apparatus with definitions of terms. The system-structural method allowed to investigate the issue of legal bases on the grounds for application of the ECtHR decision under the legislation of Ukraine. The use of sociological and statistical methods allowed to generalize legal practice, to analyze empirical information related to the research topic. Using a formal-legal method, the content and features of the application of ECtHR decisions in decisions of national courts were studied. The structural-logical method was used to analyze the necessary scope of tasks on the role and place of ECtHR decisions in the national protection of human and civil rights, which should act as a guarantor of such protection in the process of socio-political reform of Ukrainian society. An integrated approach to the use of all the above scientific methods allowed us to comprehensively consider the role of ECtHR decisions in ensuring human and civil rights in a democratic society, to develop proposals for improving the mechanism of application of ECtHR decisions in Ukraine.

We used a method of legal and doctrinal research that focused on the letter of the law rather than the law in force. Using this method, we made an analysis of the legal norms contained in the original sources. The purpose of this method is to collect, organize and describe the law; comment on the sources used; then define and describe the main theme or system and how all sources of law are linked. As part of this approach, we conducted a critical qualitative analysis of the legal materials to confirm the hypothesis. The

empirical research method uses data analysis to study legal systems. The empirical research process consists of four stages: project design, data collection and coding, data analysis, determination of the best method of presenting results. We analyzed the data and compared it to our hypothesis. The study drew on the decisions of the ECHR /**7**/, /**8**/, /**9**/, /**10**/, the Convention for the Protection of Human Rights and Fundamental Freedoms /**11**/, Constitution /**12**/ and the law of Ukraine /**13**/. A number of articles relevant to the topic of the study were also analysed.

III. RESULTS

Judgments of the European Court of Human Rights (ECtHR) are at least a doctrinal source for most Council of Europe member states. Moreover, given the authority of ECtHR decisions, they are increasingly becoming the basis for decisions by other courts, as well as courts of non-member countries of the Council of Europe. Thus, there are not isolated cases of appeals to the decisions of the European Court of Human Rights, in particular, the Federal Court of Justice of the United States to motivate its decisions. In this case, the perception of such decisions as a doctrinal source of law (in this case by the courts of other countries that are not bound by the ECHR) is clearly seen.

Using the term "source of law" in our work, we set ourselves the task of answering the question of whether the decisions of the European Court of Human Rights have the characteristics of a source of law. It is necessary to pay attention to the fact that it is impossible to consider the source of law separately from other concepts. Thus, analyzing the decisions of the European Court of Human Rights, it is necessary to emphasize first of all those that meet the following criteria: they contain a rule of law and are well-known, ie published. We emphasize that although we use the definition of "decision" in relation to acts of the European Court of Human Rights, but only because that in domestic science this term is mostly used. According to the analysis of the domestic literature, as a rule, all acts of the European Court of Human Rights are called "decisions" by the authors, but in most cases, using the term "decision", the authors mean its final decisions - resolutions that contain judgments or its legal positions /**14**/. In order to understand the essence and nature of the decisions of the European Court of Human Rights, it is necessary to understand the status of this body of supranational justice. European Court of Human Rights (hereinafter referred to as the Court) - an independent supranational body of justice, which at the European level monitors the observance of fundamental human rights by all countries party to the Convention for the Protection of Human Rights and Fundamental Freedoms /**15**/, ensuring their observance and implementation of the Convention. This is his task carries out by considering and resolving specific cases accepted by him for proceedings on the basis of complaints filed by an individual, non-governmental organization or group of individuals. It is worth noting that the number of complaints received from all States Parties to the Convention is growing every year. This may be due to the fact that citizens are dissatisfied with the results of national court proceedings, and they have no choice but to apply to the European Court. Of the greatest importance in the direct application of the norms and principles of the Convention is the case law established by the Court, which specifies human rights, determines their legal nature. This has been made possible by the application of practical approaches to judicial decision-making, borrowed from common law countries.

Today there is an establishment of the primacy of international law over domestic law as a trend in the development of both legal systems in the context of globalization. This is most pronounced, in particular, in the field of human rights protection. In the Ukrainian constitutional doctrine and practice it is accepted to state that in our country there is a primacy of the international legal obligations before norms of the national legislation in case of their conflict. The fact that this is not the case is indicated by the

constitutional regulation of the place of norms of international law (and international legal obligations of the state) in the Ukrainian legal system.

Since the case law of the European Court of Human Rights is a source of law for the national legal order, its legal nature represents the main focus of our research. we fully support the view of scientist Tumanov, who notes that the long-standing doctrinal dispute about whether judicial practice is a source of law, the case law of the ECtHR is decided unequivocally positively, its law-making role is not denied /**16**/. In the specialized literature, the origin of this practice is assessed differently and discussions on the precedent nature of ECtHR decisions are still ongoing. Opinions of scientists on this issue can be divided into several groups. Thus, the first group of authors emphasizethe precedent nature of these decisions /**17**/, /**18**/. T. Stoyanova /**19**/ directly points out that the institution of application of ECtHR decisions is in essence a kind of judicial precedent. In this context, it is stated that a negative attitude towards judicial precedent due to ideological heritage should be abandoned. This point of view deserves attention, however, in our opinion, it should be noted that authors who resort to the analysis of the place of ECtHR decisions in the national legal system and consider them as precedents, the factors that may lead to different conclusions or deviations from the general rules are not investigated /**20**/, such as the type of legal system, operating in the state, as well as the place of international law and its relationship with national in accordance with the constitution of the states /**21**/.

The second group of scholars is more conservative and notes that although the decision of the ECtHR and have a precedent, but they can not be equated with precedents in the classical sense, which is given to them in the Anglo-Saxon legal system. Example, Marchenko notes that the term and the concept of "precedent" are not one and the same: cAnglo-Saxon and Romano-Germanic right there is a notion of precedent as about the decision of the higher courts, which has a sign of binding, making the courts lower instances must during the consideration of identical cases focus on the pattern that exists. That is why this moment causes some contradictions. It is also worth considering the form of expression of precedent for which there is pluralism, covering at least three hypothetical models. One of them provides a model analogy (model of particular analogy), ie any court decision is considered only a sample that is useful to use in solving another identical legal conflict.

The application of the standards and principles of the ECtHR in Ukrainian practice is an issue related to a more general aspect, namely the place of international law in the national legal system of Ukraine. Despite the fact that the doctrinal discussion on the relationship between international and national law in the legal order of Ukraine continues, the practice of applying international agreements testifies to the implementation of the principle of primacy of international law. This is explained by the adoption of a number of decisions by the courts of first and appellate instances and their final confirmation by the Supreme Court. Particular emphasis should be placed on the urgency of the problems and techniques of application of the case law of the Court of Justice of the Europian Union, with which domestic courts and authorities are unfamiliar, and about which there are some difficulties in legally understanding the texts of Europian Union Court decisions.

The legal basis of the regional system of human rights protection of the Council of Europe is the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (ECHR). However, with the development of the Council of Europe and the human rights protection system under its auspices, as well as the deepening of the European Court of Human Rights, the Court's decisions, legal principles and standards developed by the Convention began to come to the fore. For several decades, the ECtHR has considered the ECHR as a "living instrument", guided in its decisions not by static, once adopted norms, but by real legal relations,

peculiarities of legal systems, cultures, legal consciousness of different Council of Europe member states. Therefore, we can talk about "leveling" the role and place in this system of human rights protection of the norms of the Convention itself and the decisions, standards and principles developed by the Court.

The evolutionary approach to the ECHR (interpretation of its provisions in evolution and in accordance with variable legal relations) was set out in the decisions of Tyrer v. The United Kingdom /**22**/, Marx v. Belgium /**23**/ and many others: The Court notes that the Convention is a living instrument and must be interpreted in the light of today's conditions "(hereinafter referred to as the 'method of evolutionary interpretation of the Convention' and the Convention itself as a 'living instrument'). Thus, the case law of the ECtHR on the application of the Convention, the interpretation of the norms and standards enshrined in it, as well as the activities of other Council of Europe bodies on the application and implementation of these decisions, made the decisions of this Court key in the whole system of international human rights. On the other hand, in modern international law as a whole, the role of international court decisions as a source of law is significantly increasing. This process is largely bilateral. Thus, since the end of the last century, the tendency to increase the role of state courts in the functioning of international law has become increasingly apparent. The role of both international and national legal systems largely depends on this role.

The ECtHR was established to monitor the observance of human and civil rights and freedoms. The court acts as an airbag. The Convention guarantees specific rights to everyone, and its provisions are considered by the ECtHR as rules of direct action. Individuals may lodge a human rights complaint against any of the Member States with the Court of Justice in Strasbourg after having exhausted all domestic remedies.

If the European Court finds that the applicant's human rights have been violated, the State concerned must provide justice for that person. The state may also take measures to ensure that such cases do not recur. The action taken by the national authorities in response to a judgment of the Court is under the supervision of the Committee of Ministers of the Council of Europe. At the same time, the human rights enshrined in the European Convention are protected in various ways in countries. The principles of the Convention and the case law of the European Court of Justice are taken into account in judgments given by national courts, in legislation passed by parliaments, and in decisions of national authorities. Thus, the decision of the European Court is only one of the ways to protect human rights in Europe.

However, in addition to the need to consider the Convention as a "living instrument" and "to take into account all relevant rules of international law", the judge must take into account the inconsistency of some of its provisions in the two official texts (English and French). The European Court has addressed this issue as follows: "Having… two versions of the rule-making treaty which are equally authentic but not exactly the same, the Court must, in accordance with accepted international practice, give them an interpretation which brings them as close as possible. With regard to the normative agreement, it is necessary to determine which interpretation is the most appropriate in terms of implementation and achievement of the objectives of this agreement, and not the one that gives the most restrictive interpretation of the obligations of the Parties "5. The position of the European Court of Human Rights to clarify the substance of the Convention and the case law of this Court will undoubtedly affect the position of national judges in the same process. The Court has consistently emphasized the need to take into account or take into account "all relevant rules of international law", and "the Convention should, as far as possible, be interpreted in accordance with other rules of international law of which it is a part" /**24**/, /**25**/, /**26**/.

Judgments of the ECtHR have long been a common attribute in national courts. Referring to them when filing a complaint or petition has become a "rule of thumb" for lawyers and prosecutors. There is even a belief among practitioners that the fact that a ECtHR decision is mentioned in a document may strengthen that party's position in the case. In fact, this is not the case and the reference to the ECtHR's decision does not guarantee success. The decisions of the ECtHR are of a twofold nature, but are not in themselves a source of law, although they are inextricably linked to the provisions and specify the application of the Convention for the Protection of Human Rights and Fundamental Freedoms /**27**/.

The ECtHR is essentially a jurisdiction in the field of human rights protection (Article 32 of the ECHR). This means that this court deals with all matters concerning the interpretation and application of the Convention and its protocols, as well as with individual disputes concerning human rights violations. An individual complaint about a violation of human rights and freedoms does not require the consent of the state, and the ECtHR itself is not bound by decisions of national courts. The ECtHR finds whether a person's right has been violated in terms of higher standards than national ones. At the same time, ECtHR decisions on individual disputes are binding on the member state of the ECHR and, in the event of non-compliance, certain sanctions may be applied by the Committee of Ministers of the Council of Europe.

In addition to resolving the merits of an individual dispute, the ECtHR also develops in its decision the very provisions of the Convention, which must be interpreted equally by all States parties to the ECHR. It is this feature of the "duty of equal interpretation" that allows national courts to refer to ECtHR judgments in individual disputes concerning other States. The decisions of the ECtHR can be described as precedents. And although court precedents are not a source of law in Ukraine, the de facto situation is quite different. In general, the significance of ECtHR decisions is difficult to overestimate. For most applicants, the possibility of recourse to the ECtHR was the only way to combat the imperfections of the national justice system. For practitioners, ECtHR decisions have become a "litmus test" for identifying systemic problems and at the same time setting human rights standards to strive for /**28**/.

According to Art. 33 of the Convention for the Protection of Human Rights and Fundamental Freedoms, citizens, non-governmental organizations or groups of persons who consider themselves victims, in particular states, have the right to apply to the ECtHR. The most important category of cases before the ECtHR is individual complaints. In Art. 34 of the Convention states that an individual application is a right of a natural or legal person. In particular, the court may accept applications from any person, non-governmental organization or group of persons who consider themselves victims of a violation by one of the High Contracting Parties of the rights set forth in the Convention or its protocols. Anyone who considers that his or her convention rights and freedoms have been personally and directly violated may apply to the Court.

The infringement complained of by the applicant must be committed by one of the States within its jurisdiction, ie within its territorial jurisdiction. Jurisdiction of the Court, in accordance with the provisions of Art. 32 of the Convention, applies to all matters covered by the Convention and its protocols. The jurisdiction of the ECtHR is a factor that distinguishes it as a key element of the Convention's review mechanism over other international judicial bodies; it is the peculiarities of the Court's jurisdiction that determine its place and role in the system of international institutions and in the system of the institutional mechanism of the Convention and of the Council of Europe in particular. It is important to note that the ECtHR operates in a special interstate system of human rights protection, namely: its jurisdiction includes states with different legal systems, legal culture, economic and political level of development.

It should be noted that the jurisdiction of the European Court is of a subsidiary nature, which is used only within the framework of the Convention. Subsidiarity is a fundamental principle of human rights protection. It recognizes the primary competence and duty of the State to effectively protect the domestic human rights and freedoms set forth in the Convention through its domestic remedies. The principle of subsidiarity is disclosed in Art. 1 of the Convention. In accordance with this principle, the Court's activities create additional guarantees for the protection of human rights and freedoms, which are primarily the responsibility of the States parties themselves. Judge Sorensen of the ECtHR once emphasized that the Court's obligations are subsidiary in time and scope to the activities of the competent national authorities. The task of the Convention bodies is to guide the States Parties to the Convention and to assist them in carrying out their obligations through their own legal institutions and procedures /**29**/.

More important is the general question of the place of ECtHR decisions in the domestic legal system of a member of the Council of Europe, in particular whether they are precedents for national courts. There are two main approaches: recognizing such decisions only as decisions in cases against one's own state and recognizing as precedents for national law enforcement practice all decisions of the ECtHR. Given the very nature of ECtHR judgments, which combine case law with reference to the Court's previous legal position, the latter approach takes better account of the Court's case-law. By recognizing the decision of the ECtHR against itself as binding, the State is obliged to accept and apply the legal standards and principles relied on by the Court in this case, even if they have been given in previous judgments concerning other States. In addition, such adherence by the state to the position (standards, principles) of the Court can help to improve the general human rights climate and, accordingly, significantly reduce the number of applications 14 against it. In addition, the decision of the ECtHR is an important source of interpretation of the provisions of the ECHR, which can significantly affect the quality of its application (compliance) at the national level. Another important significance of ECtHR decisions in national law enforcement practice (after their role as a doctrinal source and precedent for the national legal system) is their role in clarifying the nature of the ECHR's provisions, which can be a stage in its proper implementation and protection.

But in addition to the need to consider the Convention as a "living instrument" and "to take into account all relevant rules of international law", the judge must take into account the inconsistency of some of its provisions in the two official texts (English and French). The European Court has addressed this issue as follows: "Having… two versions of the rule-making treaty which are equally authentic but not exactly the same, the Court must, in accordance with accepted international practice, give them an interpretation which brings them as close as possible. As for the normative agreement, it is necessary to find out which interpretation is the most appropriate in terms of implementation and achievement of the objectives of this agreement, and not the one that gives the most restrictive interpretation of the obligations of the Parties". The position of the ECtHR to clarify the substance of the Convention and the case law of this Court will undoubtedly affect the position of national judges in the same process. The Court has consistently emphasized the need to take into account or take into account "all relevant rules of international law", and "the Convention should, as far as possible, be interpreted in accordance with other rules of international law of which it is a part" /**30**/.

Recommendation 17 of the Committee of Ministers of the Council of Europe on enforcement to Member States of 9 September 2003 states that enforcement of a judgment is an integral part of the fundamental human right to a fair trial within a reasonable time, as enshrined in Article 6 of the Convention for the Protection of Human Rights. Human Rights and Fundamental Freedoms certain positions or engage in certain

activities for up to three years. The case law of the ECtHR shows that the execution of court decisions is considered by the European Court as a mandatory, integral part of the trial within the meaning of Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The European Court has repeatedly emphasized in its judgments that this right would be illusory if the legal system of the state allowed a final, binding judicial act to remain unenforced. Thus, in the judgment in the case of Ivanov v. Ukraine /**31**/, the European Court emphasized that the right to a court protected by Art. 6 of the Convention, it would be illusory if the national legal system of the High Contracting Party allowed a final, binding judgment to remain unenforced to the detriment of either party (paragraph 51). Thus, the European Court stated that "more than half of the judgments of the ECtHRin cases against Ukraine concern the issue of long-term non-enforcement of final judgments, for which the Ukrainian authorities are responsible. This problem constantly reminds us of itself, giving rise to violations of the Convention for the Protection of Human Rights and Fundamental Freedoms, which are most often found by the Court in cases against Ukraine". The European Court, given the content of Art. 6 of the Convention, proceeds from the understanding of the right to judicial action as an integral element of the "right to a court".

The main approaches to this issue were formulated in the decision in the case Di-Pede v. Italy /**32**/, when the European Court explicitly stated that enforcement proceedings should be considered as a second stage of the proceedings (paragraph 24). In this judgment, the Court emphasizes that it does not interfere in the theoretical discussion (conducted in Italian doctrine) as to whether enforcement proceedings are an independent process or part of legal proceedings. According to the content of the position of the European Court, it is important for him whether the applicant's right established by the court decision was realized, and thus what was the real, practical result of the trial (paragraph 22).

It is difficult to imagine that paragraph 1 of Art. 6 described in detail the procedural guarantees provided to the parties - fairness, openness and promptness of the proceedings - and would not provide guarantees for the execution of court decisions. Interpretation of Art. 6 as a provision that only guarantees the right to go to court and to conduct a trial could lead to a situation incompatible with the rule of law, which the High Contracting Parties have undertaken to respect when ratifying the Convention. Therefore, the execution of a court decision should be considered as an integral part of the "trial" for the purposes of Art. 6 of the Convention (paragraph 25). The legal doctrine of Ukraine has repeatedly emphasized the need for the state to comply with its obligation to guarantee the exercise of the right of the subject concerned to the timely enforcement of judicial acts /**33**/.

For the courts of Ukraine, the application of the Convention and the case law of the European Court of Justice became especially relevant with the adoption on February 23, 2006 of the Law of Ukraine "On Enforcement and Application of the Case Law of the European Court of Human Rights" /**34**/, which incorporated numerous resolutions. According to Art. 17 of this Law, when considering cases, courts are obliged to apply the Convention and the case law of the European Court as a source of law. The ECtHRis an integral part of the institutional system of the Council of Europe. The fact that more and more people are applying to the ECtHR proves that it is an effective mechanism for protecting their rights and freedoms. However, the ECtHR is a supranational mechanism for the protection of human rights: its capacity is limited by its powers, the breadth of which is determined by respect for the sovereignty of the Member States which have voluntarily undertaken to comply with the judgments of which they are parties. In view of this, the effectiveness of the redress mechanism established by the European Convention on Human Rights depends not only

on the efficiency of the Court's work, but also on how conscientiously states implement its decisions. And only the combination of these two factors has the effect of ensuring human rights and fundamental freedoms provided for in the Convention for the Protection of Human Rights and Fundamental Freedoms /**35**/.

Based on the multiplicity of references to the case law of the ECtHR and the other problems mentioned above, it should be noted that although it is mandatory, it should be approached with a very prudent approach. By balance we mean defining the criteria by which the case law of the ECtHR, as well as the provisions of the Convention, should be applied to address an existing legal problem. Thus, when determining the expediency/necessity of applying the case law of the European Court of Human Rights, the sufficiency of settlement of certain disputable relations at the legislative level by the relevant Law of Ukraine should be taken into account. In this case, the case law of the ECtHR may not be applied, as these disputed relations are already sufficiently, with a certain level of clarity and clarity, regulated by national law, which corresponds to the principle of legal certainty.

However, the criteria for applying the case law of the ECtHR to resolve disputes may be the following:

1.The existence of a certain legal problem that cannot be solved without the application of the case law of the European Court of Human Rights.

2.The presence of a gap in the current legislation of Ukraine.

3.Conflict of norms of the current legislation of Ukraine (conflict of legislative acts, conflict of norms of one normative legal act).

4.Lack of a procedure for implementing certain provisions of a certain Law of Ukraine that violates conventional human rights. This is a new problem in law enforcement practice for administrative courts.

5.Ambiguous interpretation of the current legislation of Ukraine. Here we are talking about the quality of the law and the application in such circumstances of the rule of priority with the most favorable interpretation of the rule of law.

Therefore, the application of the case law of the ECtHR should promote the unity of judicial practice in the protection of human rights, freedoms and interests, and not replace the arguments and/or motivating part of the judgment or, again, be an integral attribute /**36**/.

At the same time, there are still some questions about the understanding of the legal status of the case law of the ECtHR in the domestic legal system, and there are different approaches to the application of a particular decision of the ECtHR. Thus, on the one hand, there is a legal position that since in accordance with Part 1 of Art. 46 of the Convention, the High Contracting Parties have undertaken to comply with the final judgments of the Court in any case to which they are parties, and only decisions in which Ukraine has been a party to the proceedings are of precedent. On the other hand, there is a legal position that all ECtHR decisions are a source of law. If we analyze Art. 1 of the above Law, the case law of the Court means all without exception the case law of the ECtHR.

Ukraine, represented by its respective authorities, must apply all the case law of the ECtHR, using the relevant provisions of the Convention together with the decisions of the ECtHR, in which the Court interprets its provisions. However, there are problems with the official translation of ECtHR judgments in cases where Ukraine was not a party, as many such ECtHR judgments do not currently have an official translation into the state language. And in accordance with Art. 18 of the above Law, courts must use the official translation of the decision of the Court, which is published in the official publication, or, in the absence of a translation, the

original text. But it is quite difficult to work with the original text of the decision of the ECtHR without proper philological training, and who will check the correctness of the translation by the judge and, accordingly, the application of such a decision of the ECtHR.

Thus, the Constitution does not regulate the place of decisions of international courts in the national legal system. This issue is left to legislative regulation, as noted. However, in practice this leads to a misunderstanding of international case law by national courts. There are cases of erroneous reference to the decisions of international courts. Thus, in particular, in its Resolution of 24.06.2011 No. 2a5686 / 11/2670 "On appealing the decision No. 341 of 04.04.2011 on the amount of one-time financial assistance" /**37**/ referred to the need to follow the practice of the ECtHR, as defined in Law of Ukraine "On Enforcement of Judgments and Application of the Case Law of the European Court of Human Rights": arising in connection with the obligation of the state to comply with the decision of the European Court of Human Rights in cases against Ukraine; with the need to eliminate the reasons for Ukraine's violation of the Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols; with the introduction of European human rights standards into Ukrainian justice and administrative practice; creating the preconditions for reducing the number of applications to the European Court of Human Rights against Ukraine. " Further, in order to substantiate its position on the merits, the court did refer to a number of ECtHR judgments, although citing the judgment of the European Court of Justice No. 41/74 in Yvonne van Duyn v Home Office /**38**/: The Court takes into account the case law of the European Court of Human Rights. , in particular, Kechko v. Ukraine /**39**/, Burdov v. Russia /**40**/, Case of Yvonne van Duyn v Home Office /**41**/ (case on the principle of legal certainty)".

Execution of the final decision of the ECtHR in any case to which Ukraine is a party may, according to the decision of the Court, require Ukraine to take both general measures (solving a certain legal problem in the current legislation, such as amending or improving administrative practice) and individual (elimination of a specific violation specified in the decision of the European Court of Human Rights, payment of satisfaction, review of the case in court). For most Council of Europe member states, ECtHR decisions are a doctrinal source of law. In addition, we can also observe a steady trend in the use of ECtHR practice by non-member states of the Council of Europe in the face of their judicial branches, which demonstrates the importance of ECtHR decisions as a source of interpretation of the provisions of the Convention. At the same time, in law enforcement practice there have been significant difficulties not only with the correct understanding, but also with the application of both the Convention and the decisions of the ECtHR.

In the format of a reference to the Convention and the case law of the ECtHR, it should be noted that in one part of the judgments the judges of administrative courts are limited to a general reference to certain provisions, when considering the relevant administrative case. There are also court decisions in which judges in the motivating part are limited only to generalized phrases: "it contradicts the principle of legal certainty", "in accordance with the decisions of the ECtHR" and so on. Judges may also substitute the reasoning part of a judgment for the relevant case law of the ECtHR. It should be noted here that in the judgment of the ECtHRof 10 February 2010 in Seryavin and Others v. Ukraine /**42**/, the Court stated that decisions of courts and other dispute resolution bodies must duly state the grounds on which they are based.

Some judges are confused about the understanding and distinction between the case law of the Court of Justice and the ECtHR. It is often seen that the names of ECtHR decisions are written in court decisions with errors, their texts are modified. Other problems of using the case law of the ECtHR in administrative proceedings are also the selectivity of its application, violation

of the so-called jurisdictional criterion, where the plot of the case in the decision of the ECtHR differs from the facts examined by domestic judges in resolving public law disputes the decision of the ECtHR and the decision of the relevant administrative court apply the same legal principle. And in general, the similarity of the facts in the administrative case and the circumstances of the case, which has already been considered by the ECtHR, cannot serve to apply without appeal the administrative decision of the ECtHR /**43**/.

IV. DISCUSSION

With regard to the application of the case law of the ECtHR in the administration of justice, it should be noted that such a mechanism is in its infancy. Since the legal nature of such a source of law is unfamiliar to the domestic legal system, the legal system is conflicting, and the judicial system is quite complex and multi-stage to implement, first of all, in the legal consciousness of law enforcement and citizens exercising their right to judicial protection. It should be emphasized that any system for its creation and operation requires a period of time for stability and implementation, and this does not bypass the application of ECtHR practice in the administration of justice. Attention should be paid at once to the distinction between the concepts: application of the case law of the ECtHR in the administration of justice and execution of court decisions of the ECtHR. Let's focus on the process of applying the case law of the ECtHR in the administration of justice. Thus, it should be noted at once that the recent legislative and state reforms, taking into account the direction of European integration, have strengthened control over the implementation of Ukraine's commitments to implement the provisions of the Convention, in particular regarding the administration of justice. In the administration of justice, the court of the national judicial system shall proceed from the provisions of the Convention and its interpretation.

The development of national law today is impossible without the implementation of leading European standards and case law of the European Court of Human Rights. And it's not just that there is a legal basis for this: the Law of Ukraine "On Enforcement of Judgments and Application of the Case Law of the European Court of Human Rights" and all procedural codes oblige courts to take into account the Convention on Human Rights and fundamental freedoms and the practice of the ECtHR as a source of law. The very focus on the fundamental rights and freedoms enshrined in the Convention encourages the application of ECtHR judgments in national courts. Therefore, the judicial precedent of the ECtHR is playing an increasingly important role in the system of sources of national legislation, thanks to judges, scholars, public activists, as well as applicants who have challenged domestic jurisprudence. However, despite the fact that in recent years the application of the ECtHR by Ukrainian judges has become more widespread and differentiated, it is not without certain problems, difficulties and shortcomings that need to be addressed /**44**/.

Regarding proposals to improve the national legal mechanism for implementing ECtHR decisions. It is necessary to reform the constitutional principles of implementation of international legal obligations of Ukraine (consolidation not only of the status of international legal treaty norms, but also the relationship and interaction of national law of Ukraine and international law). To harmonize the legislation of Ukraine, unifying its norms by establishing the primacy of international law: to agree on the procedure for entry into force of an international treaty, namely the signing of the law on ratification, the signing of instruments of ratification; resolving the issue of the force of international treaties that have not been ratified, etc; to settle the issue of possible situations of conflicts between the norms of international law and the legislation of Ukraine, in particular to bring this provision in line with the norms of the Constitution; to consolidate the role of decisions of international courts (other than the ECHR), the possibility of reference to them by national courts of Ukraine; taking into account international judicial practice in the judicial process of Ukraine;

amendments to the legislation on the judiciary in terms of compliance with the requirements of the ECHR.

It is necessary to amend the Law of Ukraine "On Enforcement of Judgments and Application of the Case Law of the European Court of Human Rights": to remove from the Law clearly unenforceable provisions (on examination of all draft laws for compliance with ECHR); to determine that the decision of the European Court of Human Rights, which can be applied by the courts of Ukraine, is not only a decision in cases against Ukraine, but also against other states; both the decision on admissibility and the decision on the merits (decision and judgment); to single out the practice of execution of the decision on the merits (for example, the need for appropriate changes to the legislation, judicial practice, etc.) and the practice of execution of the decision on payment of fair satisfaction; to coordinate the functions of the Representative Body with the requirements of the legislation on the judiciary; introduce a procedure for verifying compliance with the rules of the ECHR and compliance with the standards of the ECHR and the practice of the ECtHR rule-making activities (this should be a real mechanism, not the declared functions of the Representation Body) /**45**/.

This allows us to conclude that the implementation of international law depends mainly on the law-making of relevant bodies and officials of state power, the purpose of which is the introduction of international standards into national law. Given the fact that in domestic legal science there are no works in which an independent subject of study would be the structure of the mechanism of implementation of ECtHR decisions, we turn to the theoretical provisions concerning related categories, namely: structure of law enforcement mechanism, structure of law enforcement mechanism, structure of law enforcement mechanism , structure of the mechanism of ensuring human rights. A review of legal sources on the topic of the study, gives grounds to conclude that in the doctrine of law there are different approaches to determining the elements of these mechanisms.

From the position of A.M. Quail, the structure of the mechanism of law enforcement is a complex legal category, the elements of which are various legal means used by the state, its bodies and officials to ensure the lawful, fair, reasonable, targeted and timely application of the law in accordance with the will of the legislator and structurally mediated in such mandatory elements as: subject, object, procedure, method, individual acts. According to the scientist, the data can be combined into different levels, which are institutional, functional and effective /**46**/. This position of the scientist, in our opinion, is controversial, because the author first emphasizes that the elements of the enforcement mechanism are legal remedies used by different entities, and then identifies other mandatory elements, which gives grounds to conclude non-binding legal means in the structure of the studied mechanism /**47**/. At the same time, among the levels of the mechanism of application of the law offered by the scientist, the absence of normative without which law enforcement is impossible is unreasonable.

V. CONCLUSIONS

The right to a fair trial is one of the most important human rights, as it embodies the mechanism of protection of all other rights. The main guarantee of human rights protection is justice, in particular a fair trial at the international level. Therefore, taking into account the European experience and the recommendations of the Council of Europe on the implementation of the right to a fair trial in general will increase public confidence and respect for the judiciary and increase the efficiency of the justice system in Ukraine. In addition, the application of the case law of the ECtHR will not only contribute to the approximation of the national legal system to European standards, but also ensure the protection of human rights and freedoms in domestic relations, which will positively affect the implementation of fundamental principles of law.

By ratifying the Convention for the Protection of Human Rights and Fundamental Freedoms and regulating at law level the practice of enforcing ECtHR decisions by a separate Law of Ukraine "On Enforcement of Decisions and Application of the Case Law of the European Court of Human Rights", Ukraine has moved closer to establishing uniform jurisprudence legal relations. According to Art. 9 of the Constitution of Ukraine, the Convention and its Protocols are part of the national legislation of Ukraine as a valid international treaty, the binding force of which has been approved by the Verkhovna Rada of Ukraine. By agreeing to be bound by an international treaty, Ukraine undertakes to act in such a way as not to deprive it of its purpose and make it impossible to implement. Therefore, both the ratified Convention and the case law of the ECtHR in accordance with the above Law are sources of law and binding for Ukraine.

It should be noted that since the inception of the European Court of Human Rights, its decisions have been law enforcement acts concerning the practical implementation of the Convention for the Protection of Human Rights and Fundamental Freedoms. However, with the development of legal doctrines and legal science, as well as the evolution of legal systems and their mutual integration, the decisions of the Court began to take the form of precedents, the use of which in law enforcement practice is now one of the necessary preconditions for democracy and formation of civil society. Thus, the legal nature of the Court's decisions can be defined in terms of their regulatory function as follows: such decisions can be considered as a case-law precedent, namely as a law enforcement act which specifies the provisions of the Convention and which has precedent for the Court and law-making significance for the legal systems of the States Parties to the Convention.

Therefore it is necessary to offer to reformulate norm of Art. 17 of the Law of Ukraine "On Enforcement of Judgments and Application of the Case Law of the European Court of Human Rights", which declares this practice a source of law: after all, as noted, the case law of the Court is not source, but can be considered a source of concretization. It should be added that the decisions of the Court have a mixed legal nature. On the one hand, they combine the features of law enforcement and interpretative legal acts, and on the other - are the result of law enforcement specification. In any case, they can not be considered the result of lawmaking. In terms of legal regulation, these decisions are something in between the classic Anglo-Saxon precedent and continental law enforcement practice as a stable and consistent position of the courts on certain issues of law enforcement. Judgments of the Court should be regarded as having convincing precedents. The legal positions formed by the case law of the Court are not binding on the courts of national judicial systems, in particular the courts of the States against which such decisions have been taken.

The impact of the case law of the ECtHR on the national judicial system is decisive, as it is of a general nature, determined by the normative (precedent) nature of ECtHR decisions. These general decisions not only affect the change of positivist understanding of human rights in the field of human rights, but also necessarily require consideration of the established (precedent) practice of the ECtHR in the judiciary and law enforcement activities of all public authorities of Ukraine. It is necessary to strive for the formation of Ukrainian judges' skills and abilities for the necessary and reasonable use of such a source of law, to develop certain standards. The ECtHR, in turn, should provide clear guidance on its case law, including advisory opinions on the application and interpretation of the Convention, which will help clarify the provisions of the Convention and the case law of the ECtHR.

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