

APPLICATION OF THE EUROPEAN CONVENTION ON PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS AND THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN DECISIONS OF THE CONSTITUTIONAL COURT OF UKRAINE

ЗАСТОСУВАННЯ ЄВРОПЕЙСЬКОЇ КОНВЕНЦІЇ ПРО ЗАХИСТ ПРАВ ЛЮДИНИ ТА ОСНОВОПОЛОЖНИХ СВОБОД І ПРАКТИКИ ЄВРОПЕЙСЬКОГО СУДУ З ПРАВ ЛЮДИНИ В РІШЕННЯХ КОНСТИТУЦІЙНОГО СУДУ УКРАЇНИ

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The article is devoted to specific issues of the application of the European Convention on the Protection of Human Rights and Fundamental Freedoms and the practice of the Strasbourg Court in the legal positions of the Constitutional Court of Ukraine.

The scientific article examines the influence of the European Convention on the Protection of Human Rights and Fundamental Freedoms of 1950. and practices of the European Court of Human Rights on the implementation of constitutional justice in Ukraine. Based on the analysis of the decisions of the Constitutional Court of Ukraine, examples of the application of the practice of the Strasbourg Court by the constitutional control body in Ukraine for the formulation of legal positions regarding the constitutionality (unconstitutionality) of the provisions of national legislation and in the course of the official interpretation of the Constitution of Ukraine

The article singles out two established scientific approaches to the application of decisions of the European Court of Human Rights by bodies of constitutional jurisdiction: imperative, in which the application of precedent practice of the Strasbourg Court is mandatory, and dispositive – constitutional courts apply the decisions of the ECtHR in order to provide additional justification for their decisions.

As a result of the analysis of the decisions of the Constitutional Court of Ukraine in the field of human rights, it was concluded that the Court developed a national doctrine of human rights, which is based on the legal foundation of domestic legislation, the provisions of the 1950 Convention, and the decision of the Strasbourg Court. It is noted that in the system of the state mechanism, the Constitutional Court performs the role of an instrument for the implementation of European human rights standards.

It is noted that the decision of the European Court of Human Rights, together with the normative provisions of the European Convention on the Protection of Human Rights and Fundamental Freedoms, should serve as one of the guidelines for improving the legal system of Ukraine and implementing European legal standards.

Key words: Constitutional Court, decisions of the Constitutional Court, European Convention, protection of human rights, European Court of Human Rights, application of decisions, application of the Convention.

У статті досліджується питання впливу Європейської конвенції про захист прав людини і основоположних свобод 1950 року та практики Європейського суду з прав людини на здійснення конституційної юстиції в Україні. На основі аналізу рішень Конституційного Суду України наведено приклади застосування органом конституційного контролю практики Страсбурзького суду органом конституційного контролю в Україні для формулювання правових позицій щодо конституційності (неконституційності) положень національного законодавства та в ході офіційного тлумачення Конституції України.

Виокремлено два усталені наукові підходи до застосування рішень Європейського суду з прав людини органами конституційної юрисдикції: імперативний, при якому застосування прецедентної практики Страсбурзького суду є обов'язковим, та диспозитивний – конституційні суди застосовують рішення ЄСПЛ з метою додаткового обґрунтування своїх рішень.

Зазначено, що Конституційний Суд використовує рішення Європейського суду з прав людини для формування власних юридичних позицій, в результаті чого вони фактично стають змістовним елементом мотивувальної частини його рішення. Для обґрунтування правових позицій при прийнятті відповідних рішень Конституційний Суд України застосовує комплексний підхід, який полягає в застосуванні, поряд з Конституцією України та інших актів національного законодавства, Європейської конвенції, інших міжнародно-правових договорів у сфері захисту прав людини, а також рішень ЄСПЛ.

У результаті аналізу рішень Конституційного Суду України в галузі прав людини зроблено висновок про вироблення Судом національної доктрини прав людини, яка спирається на правовий фундамент вітчизняного законодавства, положення Конвенції 1950 р., та рішення Страсбурзького суду. Зазначено, що в системі державного механізму Конституційний Суд виконує роль інструмента впровадження європейських стандартів прав людини.

Констатується, що рішення Європейського суду з прав людини поряд з нормативними положеннями Європейської конвенції про захист прав людини та основних свобод мають слугувати одним із орієнтирів для удосконалення правової системи України і втілення європейських правових стандартів.

Ключові слова: Конституційний Суд, рішення Конституційного Суду, Європейська конвенція, захист прав людини, Європейський суд з прав людини, застосування рішень, застосування конвенції.

Statement of the problem. Having chosen integration into the European community as a strategic course of socio-political and legal development [1], Ukraine declared the priority of basic humanistic values and embarked on the path of implementing international law into national legislation and legal practice. This trend is primarily noticeable in the field of implementation of European standards for the protection of human rights, the basis of which is the European Convention for the Protection of Human

Rights and Fundamental Freedoms of 1950 [2] (hereinafter – the ECPHR, the European Convention), the corresponding protocols to it, as well as the practice of the European Court of human rights (hereinafter – ECtHR, Strasbourg Court).

Analysis of recent research and publications. Certain aspects of the application of the European Convention of 1950 and the precedent practice of the European Court of Human Rights during the formulation of the legal positions of the Constitutional Court of Ukraine were studied

by Ukrainian scientists in their works: M. Antonovych, Yu. Barabash, M. Gultai, T. Dudash, P. Yevgrafov, V. Campo, M. Kozubra, P. Rabinovych, N. Radanovych, M. Savchyn, A. Selivanov, V. Tykhyi, V. Shapoval, V. Shevchuk and others.

The purpose of the article is to clarify the specifics of the application of the European Convention on Human Rights and precedent practice of the European Court of Human Rights in the legal positions of the Constitutional Court of Ukraine.

Presentation of the main material. Ratification of the European Convention by the Law of July 17, 1997 Ukraine recognized the binding jurisdiction of the ECtHR in all matters related to the interpretation and application of the ECHR [3].

February 23, 2006 The Verkhovna Rada of Ukraine adopted the Law of Ukraine "On the Implementation of Decisions and Application of the Practice of the European Court of Human Rights", Article 2 of which stipulates that decisions of the Strasbourg Court regarding Ukraine are mandatory for Ukraine to implement in accordance with Art. 46 of the European Convention of 1950 [4]. In addition, Article 17 of this Law defines the legal basis for the application by courts of the European Convention and the practice of the Court: "Courts apply the Convention and the practice of the Court as a source of law when considering cases". However, it should be noted that the provision of the mentioned article does not apply to the Constitutional Court of Ukraine (hereinafter referred to as the Constitutional Court), because as a result of the constitutional reform of 2016 from part. 3 Art. 124 and ch. 1 Art. 147 of the Constitution of Ukraine, the provision on assigning the KSU to the judiciary and defining the KSU as the only body of constitutional jurisdiction in Ukraine has disappeared [5].

Constitutional reform of the judiciary in Ukraine in 2016 significantly changed the status and legal status of the KSU as the only body of constitutional jurisdiction, the Constitutional Court became an independent body of constitutional control, independent and separated from the bodies of legislative, executive, judicial power, and the president. This body primarily ensures compliance with the principle of supremacy of the Constitution of Ukraine in the activities of state bodies [6, p. 16–17].

However, as a result of the above-mentioned constitutional reform, a gap was created in the current national legislation regarding the attribution of the application of the European Convention of 1950 to the powers of the KSU. Such a situation caused an urgent need to conduct scientific research aimed at assigning the task of applying the European Convention on the Protection of Human Rights and Fundamental Freedoms and the practice of the Strasbourg Court to the powers of the KSU.

It is constitutional justice in democratic countries that acts as an effective means of adapting national legal systems to European standards of human rights protection. Due to the binding nature of the decisions of the Constitutional Court of Ukraine, its legal positions, formed on the basis of the European Convention and the jurisprudence of the ECtHR, contribute to the implementation of the latter in domestic legal practice. Applying the provisions of the European Convention and the practice of the ECtHR, the Constitutional Court guides the legislator, courts and other law enforcement bodies, as well as private individuals to take into account European legal principles and values when improving national legislation, solving legal cases, defending human rights and fundamental freedoms [7, p. 55].

At the same time, according to its status, the Constitutional Court is a body of constitutional jurisdiction that ensures the supremacy of the Constitution of Ukraine, resolves the issue of conformity of the Constitution of Ukraine with the laws of Ukraine and, in cases provided for by the Constitution of Ukraine, other acts, carries out the official interpretation of the Constitution of Ukraine, as well as other powers in accordance with the Constitution of Ukraine

(Article 1 of the Law of Ukraine "On the Constitutional Court of Ukraine" [8]).

In its legal positions, the Constitutional Court of Ukraine uses the provisions of the 1950 Convention and decisions of the Strasbourg Court as a source of law. As evidenced by the official statistics of KSU appeals to the ECHR and ECtHR decisions: to the European Convention (in particular, in the context of its interpretation by the Strasbourg Court) the Constitutional Court directly applied during the preparation of more than 70 of its decisions; KSU appealed to the decisions of the ECtHR in more than 60 decisions. Moreover, the leadership in the list of references of the Constitutional Court of Ukraine to the Convention of 1950 belongs to Article 6 – "Right to a fair trial" [2].

In the vast majority of cases of applying the Convention and the practice of the ECtHR in its activities as arguments for motivating its own decisions, the KSU uses the most complete and, so to speak, the most perfect (at least from a formal point of view) form – a reference to a specific article of the Convention and a specific decision of the ECtHR with an explanation legal position [9, p. 38].

Based on the analysis of foreign experience, two approaches to the application of ECtHR decisions by bodies of constitutional jurisdiction can be distinguished: imperative (in which, according to national legislation, the application of precedent practice of the Strasbourg Court is mandatory) and dispositive (in which constitutional courts apply ECtHR decisions for the purpose of additional justification of their decisions).

For the first time, the KSU used the practice of the Strasbourg Court when making a decision in a case based on appeals from residents of the city of Zhovti Vody dated December 25, 1997. No. 9-zp [10]. Since that time, the Constitutional Court, when formulating its legal positions, increasingly turns to both the ECHR and the decisions of the ECtHR as sources of law. However, it should be noted that in most cases such an appeal to the body of constitutional justice is rather illustrative, i.e. without additional objective justification or interpretation of the content of the violated right. Although it is worth mentioning such legal positions of the KSU, where he details it. Yes, the Constitutional Court in its decision of December 13, 2011. No. 17-pr/2011 [11], referring to the decisions of the Strasbourg Court in such cases as "Daubertin v. France" (1993), "Guincho v. Portugal" (1984), "Union Alimentaria Sanders S.A. v. Spain" (1989), "Holder v. Great Britain" (1975), "Klass and others v. Germany" (1978) emphasize various aspects of the right of access to a fair and open trial within a reasonable time by an independent and impartial tribunal, defined by Art. 6 of the ECHR, while using international norms when justifying their own decisions. Thus, the Constitutional Court uses the decision of the ECtHR to form its own legal positions, as a result of which they actually become a substantive element of the motivational part of its decision. Considering the above, it can be concluded that the decision of the ECtHR is a source of law in Ukraine and a part of the constitutional law of Ukraine.

The objective basis on which the ECHR and ECtHR decisions are applied in the domestic legal system is the national legal tradition. In the context of the problems of our research, it is appropriate to refer to the monograph of P. Rabinovych and N. Radanovych "European Convention on Human Rights: problems of national implementation", which, in particular, provides a theoretical and legal description of the main principles of the national tradition of implementing the norms of the European Convention. The authors of the monograph proposed the following definition: "Bringing the state's legal practice into line with an international legal treaty is a law-making, as well as law-interpreting, law-enforcing, and law-enforcement activity of the state, carried out to fulfill the norms of an international treaty or under its influence in order to eliminate or prevention of contradictions (inconsistencies)

between national legal phenomena and these norms" [12, p. 41]. In addition, scientists single out the following areas of influence of the decisions of the Constitutional Court of Ukraine on the national implementation of the Convention:

1) mandatory execution of the Court's decision by the state in respect of which this decision was adopted;

2) possible retrial of the case, including resumption of proceedings in cases where the Court recognized a violation of the Convention, especially when the injured party continues to suffer significant negative consequences of the decision taken at the national level;

3) harmonization of national legislation with the provisions of the Convention;

4) application of the norms of the Convention by national human rights bodies, in particular by courts. At the same time, a "transitional" or "borrowed" interpretation of the Convention is performed (actually, a "transfer of interpretation" is created);

5) interpretation of the Convention by national legal entities: legal interpretation bodies can be tasked not simply with "transferring" the interpretation proposed by the Court in relation to this category of cases, but with additional interpretation of the Court's decision itself;

6) through the activity of constitutional courts;

7) influence on the formation of legal awareness of officials and officials, as well as individual citizens [12, p. 125, 139].

Analyzing the peculiarities of the national implementation legal interpretation, the authors note that the subject of such an interpretation is:

a) norms of another – international – legal system, which, although included in the national legislation, continue to maintain a connection with the international legal system, and therefore their interpretation cannot be carried out without taking into account international requirements for the interpretation of international legal acts;

b) norms of international treaties on human rights, presuming influence on their interpretation and acts of international law enforcement bodies; such an interpretation takes place when it is necessary to correctly apply an international legal treaty on human rights (in particular, the Convention) or to establish and ensure its compliance with national legislation (this indicates that this interpretation may precede implementing legislation, since if it is established that such an agreement does not correspond to the norms of national law, then the latter will have to be changed) [12, p. 171–172].

Specialists in the fields of constitutional and international law claim that the European Convention is an international treaty that has widely borrowed the constitutional traditions of the member states of the Council of Europe. At the same time, we note that the jurisprudence of the Strasbourg Court also underwent further development due to the influence of the national constitutional law of the countries participating in the Convention.

As noted by P. Yevgrafov and V. Tykhyi, relevant constitutional norms regarding human rights and freedoms and guarantees of their provision by the participating states, if not identical, then similar to convention norms. Therefore, the legal positions of the ECtHR should also be applied when interpreting the relevant norms of the constitutions of the participating states.

In connection with the fact that human rights and freedoms are the basis of constitutions, and each of them is a single whole, the legal interpretation of the ECHR should be applied in the interpretation of other constitutional provisions. The practice of the ECtHR is also taken into account when interpreting the laws of member states, because they, like other normative legal acts, are adopted on the basis of constitutions and must correspond to them [13, p. 83].

The Constitution of Ukraine contains a catalog of human rights, which is practically similar to the corresponding catalog of the European Convention. Although some terminological differences between the convention and constitutional provisions should be mentioned. Therefore, in order to

substantiate legal positions when making relevant decisions, the Constitutional Court of Ukraine applies a comprehensive approach, that is, in addition to the Constitution of Ukraine and other acts of national legislation, it uses the potential of the European Convention, relevant international legal treaties in the field of human rights protection, as well as decisions of the ECHR. It is in this way that the influence of the European Convention and the practice of the ECtHR on the constitutional judiciary of Ukraine is carried out [14, p. 56].

P. Rabinovych proposed two main directions of influence of ECtHR decisions on constitutional justice. The first consists in taking into account by the constitutional courts the instructions and legal evaluations of the ECtHR given in its decisions in specific cases, in the consideration of which the bodies of constitutional control were involved at the stage of resolving the dispute within national jurisdictions. In particular, the ECtHR has repeatedly noted that when determining the "reasonableness" of the trial period (Part 1, Article 6 of the European Convention), it is also necessary to take into account the time of consideration of a complaint or statement of a person by a body of constitutional control, especially in cases where the latter's decision will affect the result of consideration of this case. In particular, the ECtHR has repeatedly noted that when determining the "reasonableness" of the trial period (Part 1, Article 6 of the European Convention), it is also necessary to take into account the time of consideration of the complaint or application. persons by the body of constitutional control, especially in cases where the latter's decision will affect the outcome of the consideration of this case.

In some of its decisions, the ECtHR indicated under which conditions a complaint to the constitutional court can be recognized as effective, and under which conditions it is not. It is quite obvious that due to the precedent nature of the practice of the ECtHR, its legal positions regarding constitutional justice concern not only states, who were parties to the case, but are also subject to consideration in the implementation of constitutional control and in the process of rule-making by other states that have recognized its jurisdiction (in particular, when they introduce the institution of a constitutional complaint) [15, p. 35–36].

The second direction of the influence of the practice of the ECtHR on national constitutional justice is the consideration of the principles developed by it, the conceptual and methodological foundations of the protection of human rights and fundamental freedoms when the constitutional courts adopt their decisions. Although this "channel", as noted by P. Rabinovych, is less formalized than the first, but the scope of its application can be incomparably wider [15, p. 36].

As the scientist noted, in the course of the application of the 1950 Convention by the Constitutional Court of Ukraine and the decisions of the European Court, certain legal conflicts arise that require appropriate means of resolution. First, the prerequisite for such legal conflicts is disagreements between individual provisions of the Constitution of Ukraine and the 1950 Convention. These differences can be eliminated by modernizing (updating) the Constitution of Ukraine in order to bring its provisions into full compliance with international human rights standards [16 p. 3]. Naturally, this will allow the Constitutional Court of Ukraine to more effectively implement the provisions of the Convention of 1950, laid down in the norms of the updated Constitution of Ukraine.

Secondly, legal conflicts may arise between the decisions of the European Court. Of course, he can change his legal positions if the concern for higher legal values requires it. In practice, the European Court of Justice motivates the review of its legal positions with such considerations as: a) the need to contribute to the development of society with one's decisions; b) changes in the national legal systems of member states of the Council of Europe; c) accelerated pace, speed of social changes in the respective state; d) new results of scientific

development; e) changes in public consciousness; e) raising the level, development of human rights standards [17, p. 5].

Thirdly, under certain circumstances, legal conflicts may arise between the decisions of the European Court and the Constitutional Court of Ukraine. By its decision, the European Court can, in particular, point to shortcomings regarding the protection of human rights in the practice of the Constitutional Court. This complicates the proper protection of human rights [18, p. 112].

Conclusions. Based on the above, we have reason to conclude that thanks to the decisions of the Constitutional Court in the field of human rights, the national body of constitutional jurisdiction has developed a comprehensive constitutional doctrine of human rights, which, on the one hand, is based on the legal foundation of national legislation, and on the other hand, the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms and precedent decisions of the European Court of Human Rights. In this regard, it can be stated that in the system of the state mechanism, the Constitutional Court of Ukraine performs the role of an instrument of implementation of European standards of human rights.

Thus, double protection of fundamental human rights and freedoms enshrined in the European Convention

and the Constitution of Ukraine is observed in Ukraine. Therefore, this protection takes place at the constitutional and convention levels. The specified rights and freedoms have a common legal nature and characteristics, and their content is established in the process of their application, as well as the interpretation of conventional and constitutional norms by the European Court of Human Rights and the Constitutional Court of Ukraine. In Ukraine, there are all the prerequisites for the existing general democratic standards of access to court and justice, including those formed by the practice of the European Court, to become a guideline for the legislator in the field of improving the mechanism of appeal to the Constitutional Court of Ukraine regarding the constitutionality of a law or other legal act and relevant procedures proceedings.

Summing up, we note that the issue of the application of the European Convention on Human Rights and the practice of the Strasbourg Court in the legal positions of the Constitutional Court of Ukraine continues to be one of the most relevant in domestic jurisprudence. We have every reason to believe that the decisions of the ECHR, along with the normative provisions of the ECHR, should serve as one of the guidelines for improving the legal system of Ukraine and implementing European legal standards.

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