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**THE LEGAL METHODOLOGY OF THE ECHR'S JURISPRUDENCE IN THE
CONTEXT OF THE INTERACTION AND THE RATIO BETWEEN THE LAW
OF THE MEMBER STATES AND THE CONVENTIONAL RIGHTS**

Key words: decisions, convention, human rights, practice of the ECHR.

1. The ECHR's Jurisprudence as the act of interpretation and development of the Convention for the Protection of Human Rights and Fundamental Freedoms

The Convention for the Protection of Human Rights and Fundamental Freedoms [1] as an important international standard for the protection of human rights and freedoms has the constitutional and legal guarantees of protecting a person in the ECHR (Article 55 of the Constitution of Ukraine).

According to Clause 1 of Art. 46 of the Convention for the Protection of Human Rights and Fundamental Freedoms, «States undertook to comply with the final decisions of the ECHR in all matters in which they are parties». The decisions of the ECHR directly addressed to the respondent State to carry out the mandatory execution of the sanction or compensation for the party and indirectly – the legislative, executive and judicial branches of government. The State party, together with the implementation of sanctions through the international legal obligations it has undertaken, should take measures to eliminate the grounds established by the ECtHR in relation to the violation of the Convention for the Protection of Human Rights and Fundamental Freedoms [2, c. 176, 179].

Regardless of the qualification of the legal standard produced by the ECtHR in its decisions, judicial precedents or established jurisprudence derive from the legal acts interpreted by the ECtHR. That is, it means that the precedent or established practice of the ECHR is inextricably linked to the act being interpreted is a «continuation» of the Convention itself on the protection of human rights and fundamental freedoms and is a national source of law [2, c. 175].

However, «this does not mean that everything that is accepted by the ECHR is the most important for countries-members. The established practice of interpreting the Convention for the Protection of Human Rights and Fundamental Freedoms is part of the national law. If judges, using constitutional provisions, interpret them contrary to the practice of the ECHR, they violate the Constitution» [3, c. 122].

2. Application of the practice of the ECHR as a source of law

Provisions of Art. 17 of the Law of Ukraine «On the implementation of decisions and application of the practice of the European Court of Human Rights» establishes the mandatory application by courts of practice of the ECHR as a source of law [4].

By this way, the legislation imposes a greater obligation for the courts to apply the practice of the ECHR as a source of law. The courts of Ukraine, complying with the requirements of the said Law, are also guided by the provisions of clause 2 of Article 19 of the Law of Ukraine «On International Treaties of Ukraine», namely: «If an international agreement of Ukraine, which entered into force in the established procedure, establishes rules other than those stipulated in the relevant act of the legislation of Ukraine, then the rules of the international agreement are applied» [5].

The decisions of the Chambers on the merits of the case, the exclusion of a complaint from the list (removal of the case from the hearing) and a decision on the admissibility of the complaint it is expedient to include to decisions of the ECHR as sources of law. Interim decisions of the ECtHR in their nature can not be considered as a source of law, since they do not have normative character, do not change the legal system and do not change the content of the law [6].

The nature of the decisions of the ECHR should be considered in the three-pronged sense (three-une understanding): a) their legal positions are normative; b) the decisions give an interpretation of the Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto; c) the decisions themselves are of a legal nature, since they contain a decision on a particular case.

However, when applying and interpreting the Convention within a specific case, the ECHR establishes normative guidelines in the form of its legal position. It is this circumstance that gives grounds to consider the decisions of the ECHR as sources of law – judicial precedents, but not acts of interpretation or application of law.

Legal positions of the ECHR can not serve as a source of law, as they are an integral part of a decision – sources of law. Allocation of legal positions from ECHR judgments will result in the loss of the latter case-law nature.

The peculiarity of the decisions of the ECtHR is that the ECtHR is not part of the system of national courts; in its decisions is based on the Convention for the Protection of Human Rights and Fundamental Freedoms, which is an international treaty, and, accordingly, in the course of its activities creates rules of international law. Therefore, the ECHR decisions are not national but international court precedents.

The specificity of the decisions of the ECHR as international judicial precedents determines their place in the system of sources of law in the country. Given the understanding of the Convention on Human Rights and Fundamental Freedoms as the primary source of law, it is advisable to include the of the ECHR decisions to the category derivative sources of law.

The impact of ECHR decisions on domestic legislation, law enforcement practice, science and legal consciousness of citizens, etc., is expressed in their functions. At the same time, along with the general functions of the source of law, the decisions of the ECHR carry out a number of their specific functions: the interpretation, the formation of experience in the application of the Convention and Protocols thereto, improvement of legislation and law enforcement practices, improvement of justice, information, influence

on the legal consciousness, interaction with science and development of legal doctrine [6].

To implement the decisions of the ECHR Ukraine needs to Ukrainian language text of the decision should be available for review to all interested parties and be official in the same way as the text of the Convention, translated into Ukrainian. Therefore noteworthy idea of the law on Ukrainian language official publication of decisions of the ECHR, with respect not only Ukraine, but also on other countries – members of the Council of Europe.

The practice of interpreting and implementing the ECHR's constitutional rights should be taken into account when considering cases in the context of constitutional proceedings in the event that constitutional rights correspond with the corresponding rights [7].

The Convention for the Protection of Human Rights and Fundamental Freedoms, together with the acts of the ECHR, which contain an authoritative statement of its provisions, even if they do not relate to the same subject matter, determine the legal standards of interpretation, which are inherent in the case law of the ECHR, direct and guide the trial in determining the content and the scope of basic human rights and the principles of the Constitution of Ukraine. Involvement of the authoritative substantiation of the ECtHR during the interpretation of constitutional norms requires not only a comparison of the provisions of the Constitution of Ukraine with the same provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms, but also the perception of ECHR assessments, if this is acceptable from the point of view of the methodology of interpretation and is consistent with the provisions of the Basic Law of Ukraine [2, c. 177].

However, the list of rights and freedoms enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms and their guarantees, in contrast to the rights and freedoms contained in European constitutions, including Ukrainian, is minimal. According to the established practice of the ECHR, it provides only a minimum level of protection, while leaving the courts of the national level broad scope for action in order to ensure, within the framework of its national system, a single standard for the protection of human rights and freedoms, and in the future to prevent any violation of the Convention by taking into account ECHR approaches to the application of the fundamental principles of human rights.

3. The Ratio between the Constitution of Ukraine and the Convention for the Protection of Human Rights and Fundamental Freedoms and the ECHR's Jurisprudence

The application of the Convention for the Protection of Human Rights and Fundamental Freedoms is in some way limited by the sovereignty of the Constitution of Ukraine [2, c. 175]. The courts of Ukraine a priori can not ignore the Basic Law of the state, which obliges them to act in accordance with the provisions of its articles 8 and 19. In particular, the elaboration, development and implementation of the basic provisions of the Constitution

of Ukraine take place through «laws and other normative acts that must be adopted on its basis and answer it» (Article 8 of the Constitution of Ukraine).

The issues of the limits of sovereignty in practice establishes the limits of the norms of international law, for which the state envisages a special procedure for implementation in the national system of law (Article 9 of the Constitution of Ukraine).

In this process, it is also important to take into account the official interpretation of the Constitution of Ukraine contained in the decisions of the Constitutional Court of Ukraine, which are of a general nature and are a continuation of the Basic Law of Ukraine. That is, it means that the lawmaking is primarily "connected" with the primary sources of law, including international treaties (the Convention for the Protection of Human Rights and Fundamental Freedoms), the consent of which is binding on the Verkhovna Rada of Ukraine (Article 9 of the Constitution of Ukraine). Provisions of Art. 9 of the Fundamental Law is contained in the General Principles of the Constitution of Ukraine, which reflect the constitutional order of the state and, in particular, to protect a single standard of human and civil rights and freedoms, embody the desire of Ukrainian society to voluntarily interact with the international community through the Convention for the Protection of Human Rights and Fundamental Freedoms and practices of the ECHR [2, c. 176].

The Convention for the Protection of Human Rights and Fundamental Freedoms and the case law of the ECHR are not legal acts higher than the Constitution of Ukraine and the higher ones should not contradict the Constitution of Ukraine. The Convention is a normative legal act of supreme force concerning the norms of national legislation, but not higher than the Constitution of Ukraine.

The content and level of development of the Convention should be taken into account to the extent that the rights and freedoms of man and citizen, enshrined in the Constitution of Ukraine, correspond to the corresponding convention rights. This means that, in interpreting the Constitution of Ukraine, account is taken of the content and level of development of the Convention insofar as it does not result in the restriction and abolition of legal remedies established by the Basic Law. For this reason, the case law of the European Court of Human Rights is an ancillary vehicle for the interpretation and definition of the content and scope of basic human rights and the principles of the Basic Law [8].

The application of ECHR acts should not replace or violate the activities of a legislator, which, according to the Constitution of Ukraine, is empowered to adopt domestic laws that have a clear legislative goal of their adoption in accordance with the Constitution of Ukraine. For their part, the ECtHR acts can be used by courts as an authoritative justification in favor of legal positions defined by national courts: as an authoritative justification in favor of legal positions that are formed on the basis of the Constitution of Ukraine; to clarify the meaning and meaning of the Basic Law of Ukraine; to reveal the constitutional and legal content of the law or other normative legal act (or certain of their verifiable provisions) [2, c. 180-181].

4. Conflicts of constitutional and supranational norms: ways to overcome them

There may be differences between the international and national law at different levels (for example, the contradiction between the decision of the supranational body (ECtHR) and the constitution of Ukraine, between the practice of the ECtHR and the practice of the Constitutional Court) and, in particular, refer to the different content of the rights and freedoms of human and citizen in the practice of the Constitutional Court and ECHR.

In a large number of cases, in which the approaches of the Constitutional Court of Ukraine and the ECHR to the content of the rights and freedoms of citizens and the mechanisms for their protection coincide, there may be separate cases of differences in positions.

These cases require a mechanism to overcome differences. Legal systems have formed some experience in overcoming such legal conflicts.

The priority of the rules of an international treaty over the norms of national legislation can not lead to doubts in the supremacy of the Constitution – as an act that establishes the foundations of the law and order of Ukraine and the status of international treaties itself.

The relationship between national and supra-national jurisdiction, for their normal development, can not be «vertical» in nature. The only constructive way of overcoming the differences and preventing legal conflicts is the readiness of different rule of law for cooperation and dialogue. In turn, such a dialogue should be based on the understanding and acceptance of certain reservations and basic principles, one of which is respect for the national constitutional identity of the respective states. For example, respect for national constitutional identity has become one of the principles of the work of the European Court of Justice. The effectiveness of the EU rules depends largely on respect for the European Union and its national identities of the Member States.

The special attention of supranational bodies to the provisions that form the «core» of this constitutional identity reduces the likelihood of a conflict between national and supranational law. Such a «constitutional core» consists of the norms of fundamental rights, as well as the foundations of the constitutional and state system. In these matters, the constitutional sovereignty of states is usually maintained.

An example of such a balanced approach is the doctrine of «counterliaments», produced by the constitutional justice of the Federal Republic of Germany and Italy in the 70s of the last century. So, the famous case Solange I, considered by the Federal Constitutional Court of Germany in 1974, has shaped approaches to resolving the conflict between national and supranational norms in the field of human rights protection, with regard to the law of the European Union [9].

It should be recalled that during the formation of the common legal framework of the European Communities, the Federal Constitutional Court of Germany refused to apply the norms of European law, agreeing that it establishes a lower level of protection of rights and freedoms than the norms of national law (in particular, the Constitution of the country). However, in a

few years (1986), in the Solange II decision, the Federal Constitutional Court of Germany refused to control acts of the European Communities, since the latter had attained the necessary and sufficient level of protection of human rights. The Federal Constitutional Court has refused to exercise this control until such an adequate level of protection is maintained [10].

Despite the inadmissibility of direct parallels between EU law and the law of the Convention for the Protection of Human Rights and Fundamental Freedoms and the high level of integration of supranational norms in the national legal order, there remains a place for a «constitutional nucleus», from which national systems do not retreat even in the event of discrepancies between these norms and European law. Moreover, the constitutional immunity of the countries parties to the Convention for the Protection of Human Rights and Fundamental Freedoms, which, even if it is recognized as a special status among other international treaties, remains an act of international law, which means that it can not undo or contravene the principles of law and order of the state.

The response from the national legal systems in this dialogue is the desire to understand and interpret its legislation, including the constitutional provisions, in accordance with the standards of the Convention for the Protection of Human Rights and Fundamental Freedoms. Special role in this case belongs to the constitutional courts. Possible and acceptable such interpretation of the norms of the Constitution, which, without violating the constitutional identity, brings national regulation closer to supranational, thereby ensuring the dialogue of legal systems. In some national systems there are cases of changes in the Constitution as a result of the adoption of ECHR rulings. However, such voluntary rapprochement usually does not touch upon the «key» elements of national constitutional identity – the so-called "immutable core" of constitutional law and order [11].

5. Dialogue of supranational and national legal systems and methodology for the interpretation of the Conventional ownership right (on the materials of the case of the ECtHR "Zelenyuk and Tsitsury v. Ukraine" of 22 May 2018).

The ECHR interprets the Convention on the Protection of Human Rights and Fundamental Freedoms as a «living organism», which provides for the autonomous interpretation of conventional norms, regardless of the legislation of the respective member states in accordance with the provisions of the principle of proportionality of state interference in the ownership right of a person, which provides an assessment of the arguments of the parties based on four factors: the existence of interference with the rights protected by the Convention, the legality of such interference, the interests of society, the proportionality of restrictions.

For the Ukrainian law, is a significant issue of assigning to the «immutable core» of the constitutional order of law between the interference of the state in the right of ownership of land in the conditions of the absolute prohibition on the purchase and sale of agricultural land is established.

The decision of the ECHR in Case Zelenyuk and Tsitsura v. Ukraine dated May 22, 2018, the establishment by the State imposing of an absolute

moratorium on the alienation of agricultural lands in Ukraine was considered a violation of Article 1 of the Protocol to the Convention on the Protection of Human Rights and Fundamental Freedoms (ownership protection) [12].

The Court found the interference with the applicants' rights in order to exercise control over the use of property in accordance with the interests of society.

The court found that the restrictions imposed on the exercise of the rights of the applicants met the requirement of «legality», since the moratorium was enshrined in domestic law, the provisions of which were available, and the above provisions of the law were not declared unconstitutional (as opposed to the circumstances of the case in the *Hutten-Czapska v Poland* and *R & L, s.r.o. and Others v. the Czech Republic*) [13].

However, according to the applicants, the laws does not meet the requirement of «predictability» developed in the practice of the court, because even if the initial duration of the moratorium in three years was predictable, repeated measures for its extension can not be considered as such.

Moreover, it is reasonable to assume that the period of three years should be sufficient for the adoption of the necessary legislation governing the land market. The applicant's comments on the creation of a legal uncertainty by the Government were taken into account by the Court first of all in order to establish whether would be ensured a balance between the interests of the public and the applicant's property rights (*Hutten-Czapska v. Poland, Broniowski v. Poland*).

As a result of the analysis of legislative restrictions, the Court found that such goals as preventing the concentration of land in the hands of several people and impoverishment of the rural population «are not without reasonable grounds». Therefore, this issue, as well as the issue of legal uncertainty caused by the repeated extension of the moratorium term should be considered in the context of the proportionality of the restrictions imposed.

In order to assess the proportionality of the restrictions, the Court drew attention to the following components of the measures taken: legal uncertainty, reasons for the introduction and maintenance of the moratorium, excessive burdens on the applicants.

When considering the issue of legal uncertainty, the Court proceeded from the assumption that changes in land legislation contradicted the declared intentions and in fact were directed not to gradual easing but to increasing restrictions.

In addition, if the government, from the very beginning, sought to establish the actual date for the moratorium termination, today it is not a question of the date of definitive cancellation, regardless of periodically set deadlines for drafting legislation that would regulate the market for land plots.

By conducting a legal analysis of the reasons for the introduction and preservation of the moratorium, the Court proceeded from the fact that, despite the declared objectives of preventing the impoverishment of the rural population, excessive concentration of land in the hands of several people, and the reduction of the processing of arable land, such objectives do not affect the situation of owners living in cities and not involved in agriculture.

In particular, the applicants drew the Court's attention to the fact that, given their age and the distance between the place of actual residence and land, agriculture is not an affordable way of earning them. Regarding the risk of impoverishment of the rural population as a whole, the Court noted that, with the extension of the moratorium, legislators acknowledged that an absolute prohibition on alienation only provided time for the preparation of the necessary legislative framework.

Finally, as regards the prevention of excessive concentration and the cessation of cultivation of arable land, the Court noted that the Ukrainian legislation already contains certain provisions aimed at achieving the stated objectives. These include: the tax regime, which provides benefits for the payment of land tax on cultivated land, restrictions on categories of persons who may own land, as well as restrictions on the maximum area of the land.

In this regard, the Court conducted a comparative analysis of the laws of the member states of the Council of Europe in this area and emphasized that none of the states provides for a similar absolute prohibition.

As to the burden on the applicants of the prohibition applied, the Court proceeded from the fact that, in accordance with the Government's position, in spite of the established restrictions on alienation, the applicants in this case could lease their land at market rates. The state does not limit these rates, but rather takes measures to support them in the interests of landowners by setting a minimum rent.

In response, the applicants and the third party agreed with the statistics, which indicate that the maintenance of the moratorium, by contrast, promotes the interests of tenants, many of which are large enterprises. In addition, the government did not provide any concrete evidence to demonstrate how the moratorium serves the protection of vulnerable groups of the population.

Accordingly, taking into account the duration of the restrictions (which have been in force for the last 17 years and also concern the first and second applicants personally for more than 12 and 10 years respectively), their wide range (prohibition of alienation and use for any purpose other than agriculture) and absolute character (measures do not provide for exceptions and are not subject to separate review), the Court has concluded that the restrictions are excessively burdensome for the applicants.

As a result, the ECHR ruled that Ukraine in this case exceeded the broad discretion in this area and did not ensure a fair balance between the interests of society and the applicants' property rights.

In accordance with Article 46 of the Convention on Human Rights and Fundamental Freedoms, Ukraine is obliged to comply with the final rulings of the Court in any matter in which it is a party. In this case, this means adopting legislative measures to ensure fairness and respect for the rights of agricultural landowners. However, such a judgment of the Court does not mean that Ukraine should immediately introduce an unrestricted market for agricultural land – the State is still not restricted in the right to choose the method by which it will fulfill its obligations arising from the Court's decision.

Despite the fact that, in this case, the plaintiffs were not awarded monetary compensation (in addition to compensation for the costs of a lawyer's salary), the Court warned that in the event that the State finds an unreasonable delay in taking the necessary measures, in future decisions cash payments may become necessary, in any case for certain categories of landowners.

The said decision of the ECHR should be qualified as being in line with the spirit of dialogue and cooperation between supranational and national legal orders from the constitutional law-enforcement issues relating to the interference of the state in the ownership right to land in the conditions of the absolute prohibition on the purchase and sale of agricultural lands established by law if in this case, established by the practice of the ECHR the principle of proportionality of interference with the right of ownership of a person is not violated.

In case of violation of the principle of proportionality interference with property rights applicant's, ECHR recognizes their conventional rights have been violated and applies sanctions, which obliges States to take legislative measures to ensure justice and the rights of owners of agricultural lands.

Obviously, the response to this decision by the ECHR on the part of the national legal system should be the desire to understand and interpret by the Ukrainian State own Laws, including constitutional provisions, in accordance with the standards of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The Constitutional Court of Ukraine has a particularly important role to ensure possible and permissible interpretation of the norms of the Constitution, which, without violating constitutional identity, will bring national regulation closer to supranational, thereby ensuring the dialogue of legal systems.

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UN CONVENTIONAL BODIES AS ALTERNATIVE TO THE EUROPEAN COURT OF HUMAN RIGHTS: PRO ET CONTRA

Thesis reflected the practical specialties, drawbacks and benefits of the implementing the conventional committees, established in the framework of the UN universal treaties for defending rights of criminal proceedings` participants. Author pointed on the reasons of the relatively low usage those mechanisms in the Ukrainian legal practice, lighted the ways of their execution for a huge procedural perspective.

Key words: *conventional committees, criminal proceeding, individual application, new established circumstances, universal treaties.*