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Southern Regional Centre
of the National Academy of Legal Sciences of Ukraine

ECHR’S JURISPRUDENCE IN DIGITAL ERA

PROCEEDINGS
of International Scientific Conference

May 31 – June 1, 2019

Odesa
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Materials of the international scientific conference «ECHR’s Jurisprudence in Digital Era» are devoted to new age of modern legal methodology in the European jurisprudence; European Court of Human Rights case law; future law school and the rule of law crisis.

The modern legal problems connected with the need to ensure appropriate realization of human rights in the sphere of digital technologies, the Internet of things and artificial intelligence are considered.

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Президент України

Учасникам та гостям
Міжнародної науково-практичної
конференції

Шановні учасники та гості!

Щиро вітаю із початком роботи Міжнародної науково-практичної конференції "ECHR's Jurisprudence in Digital Era" "Юриспруденція ЄСПЛ у цифрову еру".

Упевнений, що результати досліджень теоретичних та практичних аспектів, які будуть представлені на міжнародній конференції, забезпечать ефективне застосування практики Європейського суду з прав людини у нашій країні, сприятимуть удосконаленню механізмів виконання його рішень та матимуть практичну цінність під час розробки змін до чинного законодавства, обумовлених потребою у забезпеченні виконання рішень цієї судової інституції.

Бажаю усім вам успіхів, цікавих дискусій та вагомих здобутків.

Володимир ЗЕЛЕНСЬКИЙ

PRESIDENT OF UKRAINE

To Participants and Guests of International Scientific and Practical Conference

Dear Participants and Guests!

Sincerely congratulate you with the beginning of the International Scientific and Practical Conference “ECHR’s Jurisprudence in Digital Era”.

I believe, theoretical and applied studies` results that will be presented at the International Conference provide us with the effective use of European Court of Human Rights` practice in our country, contribute to the improvement of its decisions enforcement mechanisms and have practical significance during the current legislation amendments` development, provided for this Judicial institution judgements and decisions` implementation need.

Wish to all of you success, interesting discussions and significant achievements.

Volodymyr ZELENSKYY

PRIVATE OFFICE OF THE SECRETARY GENERAL
AND THE DEPUTY SECRETARY GENERAL
The Director

COUNCIL OF EUROPE
1949 . 2019
CONSEIL DE L'EUROPE

Strasbourg, 13 May 2019

Dear President,

Thank you for your invitation addressed to the Secretary General of the Council of Europe, Mr Thorbjørn Jagland, to deliver a speech at the International Conference "ECHR's jurisprudence in Digital Era", which will be held in Odessa from 30 May to 2 June.

Unfortunately, due to prior work commitments at that time, it will not be possible for either the Secretary General or the Deputy Secretary General to attend.

Allow me to extend our best wishes for a successful Conference. We look forward to receiving a copy of its conclusions.

Yours sincerely,

Leyla Kayacik

Professor Sergiy Kivalov
President
National University "Odessa Law Academy"
Fontanska doroga str. 23
Odessa
Ukraine

COUNCIL OF EUROPE
F-67075 Strasbourg Cedex | Tel ► +33 (0)3 88 41 28 06 | E-mail ► leyla.kayacik@coe.int | Tel ► +33 www.coe.int

THE GREETING ADDRESS OF THE PRESIDENT OF THE NATIONAL UNIVERSITY "ODESA ACADEMY OF LAW", ACADEMICIAN SERHII KIVALOV

Dear colleagues!

I'm very pleased to welcome everybody at the International scientific conference "ECHR's Jurisprudence in Digital Era". The ambitious academic event being run in the National University "Odesa Law Academy" joined the judges of the ECHR, Supreme Court, Constitutional Court of Ukraine, the leading judges, attorneys, lawyers, scientists from all Ukraine.

Today, due to the rulings of the ECHR, the rights and interests of thousands citizens were protected, that hopelessly tried to restore them applying to State authorities and courts. The ECHR is the court of hope to the Rule of law and Justice. The judgments of Strasbourg Court are not only aimed to protect the applicant's rights and interests, but also are the framework for the formation of the national jurisprudence. Such responsible mission requires the considerable efforts, as each judgement based on the international law, is not always acceptable for certain states.

At all conclusive importance of the judgments of the ECHR for implementation, the improvement of national legislation of some states, formation of common standards in the domain of realization and protection of the rights of citizens, there are still exist a lot of problems. Almost always they are connected with the performance appraisal of Strasbourg court and execution of the submitted judgments. Since signing the Convention for the Protection of Human Rights and Fundamental Freedoms in 1950, in geopolitical world map serious changes took place, rapid development was received by the domain of information technologies. And though the values set up in the Convention to be constant, the ECHR on making judgments uses such categories, concepts and terms that not always correspond accepted definition which developed in standard and judiciary practice of States – the Parties to the Convention. It is therefore the doctrine policy of the Court and its independence from national approaches and doctrines are defined. Moreover, as a result of necessity of the Court practice for national judicial and administrative bodies this politics acquired the supremacy features.

The theme of the Conference “ECHR’s Jurisprudence in Digital Era” is caused by the necessity of the problems’ solving that arise in modern society with progressive development of information technologies. Today in a state of innumerable information flows, boundless and at times unattended access to any information, the questions of personal safety, protection of right to private life, protection of honour, dignity and business reputations are actualized.

All fields of the activity of the State, society and citizens face global changes. During the period of reforms in Ukraine that to be held in judicial, law system, legal profession, constant changes in the legislation, it is important to provide an effective protection of citizens, also against illegal acts or omissions committed by the administration. Unfortunately, national institutions are not always able to provide the proper protection of rights and interests of natural and legal persons. It manifests itself in the amount of references to the ECHR on the infringements of the Convention for the Protection of Human Rights and Fundamental Freedoms, in particular, Article 5 “Right to liberty and security of person”, Article 6 “Right to a fair trial”, Article 8 “Right to respect for private and family life”, Article 10 “Freedom of expression”, Article 13 “Right to an effective domestic remedy”, etc.

The protection of rights in the ECHR depends not only on decision-making, and primarily on the readiness of States –– the Parties to the Convention to conduct them timely and proficiently. The amount of applications being submitted on similar infringements suggests the presence of system and/or structural problems existing in the State. Reference to the structural problems in the judgments of the ECHR is called to help the States in search of suitable solutions. As it will allow not only to improve the level of protection of rights and interests of citizens, but also to diminish the amount of complaints substantially, primary amount of which are unacceptable ones.

To produce the common recommendation for all States – the Parties to the Convention Conventions on performance of the judgments of the ECHR and the proposals for adjustment of legislative and institutional arrangements of increase of the level of protection of rights and interests of citizens is not feasible. It is caused, first of all, by different political, social and economic national factors.

That is why it is important to analyze the practice of consideration by the ECHR of complaints of certain States. This could reveal the most often repeated infringements, timeliness and completeness of performance of the judgments of the ECHR and on the grounds of received information to develop recommendations for improvement of legislative and institutional arrangements of effective legal protection within the national level.

I am certain that the International scientific and practical conference “ECHR’s Jurisprudence in Digital Era” will set a solid foundation to conduct the scientific researches for execution of the judgments of the ECHR in Ukraine and will become a good tradition of Odesa Law School.

Professionalism of the participants in the conference, the practical experience and deep theoretical knowledge will help to produce the structural proposals directed to increase in the activity of the ECHR efficiency, the public authority, ensuring of legal security of citizens and to support the Rule of Law in the State.

I extend to all the participants a fruitful discussion, productive co-operation, creative inspiration and good luck to achieve the objectives!

***Serhii Kivalov*,**
Doctor of Law, Professor, Academician of the
National Academy of Legal Sciences of Ukraine,
President of the National University «Odesa Law Academy»

Doc. 13087
07 January 2013

Ensuring the viability of the Strasbourg Court: structural deficiencies in States Parties

Report[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Serhii KIVALOV, Ukraine, European Democrat Group

Summary

States Parties bear the "primary responsibility" for ensuring the European Convention on Human Rights is applied effectively at national level, alongside the European Court of Human Rights and the Committee of Ministers.

The Committee on Legal Affairs and Human Rights deplores the fact that the Court is "still overloaded with a large number of repetitive cases revealing widespread dysfunctions in national legal orders". It lists nine States (Bulgaria, Greece, Italy, the Republic of Moldova, Poland, Romania, the Russian Federation, Turkey and Ukraine) which continue to have "major structural problems" – adding that countries with a high proportion of complaints in relation to their population should also face scrutiny.

The committee calls on States Parties to the Convention to create strategies and action plans to deal with their structural problems, and amend their laws in line with the Court's case law. States Parties should also consider establishing a national body responsible solely for the execution of the Court's judgments. Moreover, national parliaments should be actively involved in the implementation of these judgments, and in particular of those revealing structural deficiencies.

The Council of Europe governments are also called on to "increase pressure and take firmer measures" in cases of dilatory and continuous non-compliance with the Court's judgments.

1. Reference to committee: Doc. 12370, Reference 3716 of 8 October 2010.

F - 67075 Strasbourg Cedex | assembly@coe.int | Tel: +33 3 88 41 2000 | Fax: +33 3 88 41 2733

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A. Draft resolution[2]

1. The Parliamentary Assembly considers that the viability of the human rights protection system based on the European Convention on Human Rights (ETS No. 5, "the Convention") falls within the scope of the shared responsibility, alongside the Committee of Ministers, of both States Parties and the European Court of Human Rights ("the Court"). However, it is the primary responsibility of States Parties to ensure that the Convention is applied effectively at national level.

2. The Assembly recalls its previous work on this subject, in particular its resolutions and recommendations on the implementation of the Court's judgments, including Resolutions 1516 (2006) and 1787 (2011) and Recommendations 1764 (2006) and 1955 (2011), and its Resolution 1856 (2012) on guaranteeing the authority and effectiveness of the European Court of Human Rights.

3. The Assembly deplores the fact that the Court is still overloaded with a large number of repetitive cases revealing widespread dysfunctions in national legal orders. Most of them relate to structural issues identified by well-established case law, such as the excessive length of judicial proceedings, chronic non-enforcement of domestic judicial decisions, deaths and ill-treatment attributable to law enforcement officials and lack of effective investigation thereof, unlawful detention on remand and its excessive length. In addition, there are specific systemic/structural deficiencies in States Parties. Some of them only exist within one national legal system.

4. The Assembly confirms (as underlined in Resolution 1787 (2011)) that Bulgaria, Greece, Italy, the Republic of Moldova, Poland, Romania, the Russian Federation, Turkey and Ukraine face major structural problems leading to worrying delays in the execution of the Court's judgments. However, in order to ensure the viability of the Strasbourg Court, States Parties which have a high proportion of complaints in relation to their population size should not be excluded from the scope of the investigation into structural deficiencies.

5. The Assembly insists on the fact that, where the Strasbourg Court has identified major and complex structural deficiencies in States Parties, regular and stringent national supervision must be ensured to adequately deal with them, in addition to their examination by the Committee of Ministers under the latter's "enhanced supervision procedure".

6. The Assembly is deeply concerned about this situation, which undermines the effectiveness of the Convention system and prevents the Court from focusing on new and important questions of interpretation and application of the Convention.

7. The Assembly therefore calls on States Parties to:

7.1. strengthen their efforts to execute fully and rapidly the Court's judgments, including through the implementation of the Interlaken Declaration and Action Plan of 19 February 2010 as well as the Izmir Declaration of 27 April 2011 and the Brighton Declaration of 20 April 2012, and in particular:

7.1.1. set up, as a matter of priority, comprehensive strategies aimed at solving structural problems, and co-ordinate these strategies at the highest political level;

7.1.2. rapidly provide action plans to the Committee of Ministers;

7.1.3. consider establishing a national body responsible solely for the execution of the Court's judgments, in order to avoid a conflict of responsibilities with the agent representing the government before the Court;

7.2. amend legislation according to standards stemming from the case law of the Court and ensure that the Convention is implemented by all relevant national authorities;

7.3. put in place effective domestic remedies, primarily in areas affected by structural problems;

7.4. take comprehensive measures with a view to raising awareness of the Convention standards as interpreted by the Court. In States Parties with major structural problems, these measures could consist, in particular, in:

7.4.1. creating a publicly available database containing the Court's case law, including judgments pertinent to the State Party concerned in official translation;

7.4.2. improving legal education with a view to deepening knowledge about the Convention among legal professionals;

2. Draft resolution adopted unanimously by the committee on 12 November 2012.

7.5. strengthen national authorities' co-operation with civil society, bar associations, experts and national human rights institutions.

8. The previous work of the Assembly has shown the need for an increased role of national parliaments in monitoring the effective implementation of the Convention standards at national level. The Assembly therefore:

8.1. reiterates its call on States Parties to put into practice the basic principles for parliamentary supervision in this field, as set out in its Resolution 1823 (2011) on national parliaments: guarantors of human rights in Europe;

8.2. invites parliaments to ensure that their committees monitoring compliance with human rights obligations are actively involved in the execution of the Court's pilot judgments and other judgments revealing structural problems;

8.3. invites the members of the Assembly, in their capacity as national parliamentarians, to question regularly their governments regarding execution of the Court's judgments.

B. Draft recommendation[3]

1. The Parliamentary Assembly, referring to its Resolution …. (2013) on ensuring the viability of the Strasbourg Court: structural deficiencies in States Parties, urges the Committee of Ministers to continue to use all available means to ensure the viability of the European Court of Human Rights ("the Court") and to that effect recommends that it:

1.1. consider further developing the Court's HUDOC database into a comprehensive database of the Court's case law, including cases pending before the Court and its own database on information concerning the implementation of its judgments; the latter database should also include information on the Court's recourse to the "pilot judgment" procedure and supervision procedures undertaken by the Committee of Ministers;

1.2. continue to afford priority treatment to the implementation of the Court's pilot judgments and other judgments revealing structural problems;

1.3. consider the possibility of regularly providing statistical analyses with respect to progress made in the elimination of structural deficiencies, as identified by the Court and the Committee of Ministers;

2. The Assembly reiterates its call in Recommendations 1764 (2006) and 1955 (2011) on the implementation of judgments of the European Court of Human Rights, to increase pressure and take firmer measures in cases of dilatory and continuous non-compliance with the Court's judgments by State Parties.

3. Draft recommendation adopted unanimously by the committee on 12 November 2012.

C. Explanatory memorandum by Mr Kivalov, rapporteur

1. Introduction

1.1. The rapporteur's mandate

1. The motion for a resolution entitled "Ensuring the viability of the Strasbourg Court: structural deficiencies in States Parties" was referred to the Committee on Legal Affairs and Human Rights on 8 October 2010 for report.[4] The committee appointed me rapporteur on 17 November 2010. It is important to note that this report is connected to the previous reports of Mr Christos Pourgourides (Cyprus, EPP/CD) and the current mandate of his successor, Mr Klaas de Vries (Netherlands, SOC), who cover the more wide-ranging issue of "The implementation of judgments of the European Court of Human Rights".[5]

1.2. Previous work of the committee

2. To date, the Committee on Legal Affairs and Human Rights has reflected on the issue of the effectiveness of the European Court of Human Rights ("the Court") on several occasions. In particular, it has issued seven reports on the implementation of Court judgments.[6] The last report on this issue, prepared by Mr Pourgourides, showed that structural deficiencies pertaining to the effective implementation of Strasbourg Court judgments still remain in a number of countries.[7]The report highlighted persistent problems in nine member States of the Council of Europe (Bulgaria, Greece, Italy, Republic of Moldova, Poland, Romania, Russian Federation, Turkey and Ukraine). Consequently, the Assembly expressed grave concerns about the continuing existence of major systemic deficiencies, which seriously undermine the rule of law in the States concerned, and called upon the above-mentioned nine States to resolve those problems.[8] However, as stressed by Ms Marie-Louise Bemelmans-Videc in her report, "it is obvious that a one-size-fits-all approach for improving domestic remedies (for example, requiring State legislatures to draft similar laws) is not appropriate. The Court recognises that States Parties require flexibility to operate within the bounds of their diverse national conditions and legal frameworks".[9]

1.3. Purpose of the present report

3. In my explanatory memorandum, I will strive to define the terms "structural/systemic deficiency", "leading case" and "clone/repetitive case", as well as to identify the measures taken to eliminate structural deficiencies by the nine States Parties that were listed in Mr Pourgourides' report. Furthermore, along with some general suggestions, I will recommend national measures, including supervision of the execution of judgments by national parliaments, to ensure that structural deficiencies are promptly and adequately dealt with in order to safeguard the viability of the Strasbourg Court. For the purpose of this report, I asked parliamentary delegations from the nine above-mentioned States Parties to comment on the measures that have been taken in order to deal with major structural deficiencies; to date, only three delegations, Bulgaria, Poland and Turkey, have replied.

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4. Doc. 12370 of 28 September 2010, Reference No. 3716.
5. For an update on the status of the report Mr de Vries is currently working on, see "Reports under preparation in the Committees of the Parliamentary Assembly of the Council of Europe," AS/Inf (2012) 10 of 25 October 2012.
6. These seven reports gave rise to seven resolutions and six recommendations. See Resolution 1226 (2000) and Recommendation 1477 (2000) of 14 January 2000; Resolution 1268 (2002) and Recommendation 1546 (2002) of 22 January 2002; Resolution 1297 (2002) and Recommendation 1576 (2002) of 23 September 2002; Resolution 1381 (2004) of 22 June 2004; Resolution 1411 (2004) and Recommendation 1685 (2004) of 23 November 2004; Resolution 1516 (2006) and Recommendation 1764 (2006) of 2 October 2006; Resolution 1787 (2011) and Recommendation 1955 (2011) of 26 January 2011.
7. "Implementation of judgments of the European Court of Human Rights", 7th Report, Mr Christos Pourgourides (Cyprus, EPP/CD), Doc. 12455 of 20 December 2010.
8. See Resolution 1787 (2011).
9. "Guaranteeing the authority and effectiveness of the European Convention on Human Rights", report by Ms Marie-Louise Bemelmans-Videc (Netherlands, EPP/CD), Doc. 12811 of 3 January 2012, paragraph 33.

2. Definition of terms

2.1. Structural/systemic problem and pilot judgment procedure

4. The term "systemic" or "structural" problem often appears in documents issued by the Committee of Ministers and in judgments of the European Court of Human Rights. It is a relatively recent expression of the idea, inherent in the Convention system, that problems revealed – when violations are established – call not only for individual, but also for general measures when there is a risk of further similar violations.[10]

5. Both the European Court of Human Rights and the Committee of Ministers have highlighted the importance of prioritising cases that raise major structural or systemic problems.[11] As of 31 March 2011, the Court inserted in its Rules of Court a special rule, Rule 61, on the "pilot-judgment" procedure.[12] Rule 61.1 specifies how the Court is to use this procedure "where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications". The cases selected for this procedure "shall be processed as a matter of priority" (Rule 61.2.*c*).

6. Therefore, a structural or systemic problem may be considered a "dysfunction" in the national legal system which may lead, in particular, to numerous applications before the Court in Strasbourg. The Court defines such a problem in the context of the specific circumstances of a case before it. As stressed by the Steering Committee for Human Rights (CDDH), a structural or systemic problem "may originate in legislation or an absence of legislation or an administrative or judicial practice that may be contrary to the Convention (length of pre-trial detention, length of proceedings, detention conditions, non-execution of final judgments, property rights, etc.)".[13] However, according to the Committee of Ministers' practice, the fact that a group of judgments pending execution before it is small does not prevent the underlying structural problem to be considered as important.[14]

2.2. Leading cases and clone cases

7. The annual reports of the Committee of Ministers make a distinction between "leading" cases, "clone" or "repetitive" cases, and "isolated" cases.[15]

8. A "leading case" is a case which either the Court, in one of its judgments, or the Committee of Ministers has identified "as revealing a new structural/general problem in a respondent State and which thus require[s] the adoption of new general measures (although these may already have been taken by the time the judgment is given), more or less important according to the case(s)".[16] This term also includes "pilot judgments" that extend beyond the particular case or cases at hand so as to cover all similar cases raising the same underlying issue.[17] The aim of a pilot judgment is: (a) "to determine whether there has been a violation of the Convention in the particular case"; (b) "to identify the dysfunction under national law that is at the root of the violation"; (c) "to give clear indications to the Government as to how it can eliminate this dysfunction"; (d) "to bring about the creation of a domestic remedy capable of dealing with similar cases (including those already pending before the Court awaiting the pilot judgment), or at least to bring about the settlement of all such cases pending before the Court".[18]

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10. According to Committee of Ministers' practice, individual measures are aimed at ensuring that the violation has ceased and its consequences for the injured party have been erased, whereas general measures are aimed at preventing further similar violations of the Convention. See in particular the 5th Annual Report of the Committee of Ministers on "Supervision of the execution of judgments and decisions of the European Court of Human Rights", Council of Europe, April 2012, p. 16.
11. See "States with major structural/systemic problems before the European Court of Human Rights: statistics", AS/Jur/Inf (2011) 05 rev 2 of 18 April 2011.
12. Rule 61, European Court of Human Rights' Rules of Court of 1 May 2012, pp. 33-34. This rule was inserted in response to the request addressed to the Court, at the February 2010 Interlaken Conference on the Court's future, to "develop clear and predictable standards for the pilot judgment procedure as regards selection of applications, the procedure to be followed and the treatment of adjourned cases". "New rule introduced concerning handling of systemic and structural human rights violations in Europe", press release issued by the Registrar of the Court, No. 256 of 24 March 2011. See also "Pilot Judgments", Factsheet prepared by the European Court of Human Rights Press Unit, July 2012.
13. "Implementation of the Interlaken Declaration", First Report by the CCDH, CDDH(2010)010 Addendum I of 18 June 2010, Appendix III, paragraph 6.
14. 5th Annual Report 2011, op. cit., p. 40.
15. For example, see "Supervision of the execution of judgments of the European Court of Human Rights," 4th Annual Report 2010 by the Committee of Ministers of April 2011, Appendix 2, p. 29.
16. Ibid.
17. Ibid.

9. Cases where the violation hinges on the specific circumstances of the case and where it is unlikely that the violation will be repeated are labelled "isolated cases".[19]

10. "Clone" or "repetitive" cases are "those relating to a structural or general problem already raised before the Committee of Ministers in one or several leading cases; these cases are usually grouped together – with the leading case as long as this is pending – for the purposes of the Committee's examination".[20]

3. Overview of substantial structural/systemic deficiencies

11. In Resolution 1787 (2011) on the implementation of judgments of the European Court of Human Rights, the Assembly noted the continuing existence of major systemic deficiencies that cause large numbers of repetitive findings of violations of the Convention and seriously undermine the rule of law in the States concerned. These most widespread systemic/structural deficiencies, which represent common domestic problems for several States, are identified and discussed in section 3.2 of this report.

12. In addition, there are specific systemic/structural deficiencies in States Parties. Some of them only exist within one national legal system. This group of systemic/structural deficiencies requires special attention from national authorities.

3.1. Identifying the range of States with substantial structural/systemic deficiencies

13. In order to identify the range of States with major structural/systemic deficiencies**,** it is necessary to analyse the statistics of the European Court of Human Rights[21] and the Committee of Ministers' annual reports on the supervision of the Court's judgments.[22] It is also important to note that the structural/systemic deficiencies that arise within the legal systems of the States Parties are complex. As such, in this report, I will try to take into account all approaches and factors that may influence the objective evaluation of the problems at hand.

14. The majority of States Parties to the Convention belong to the Romano-Germanic legal family, where the role of precedent is deemed to be heterogeneous. Evidently, neither governments nor civil society in the so-called "newly democratic States" have effectively used the practice of the Strasbourg Court. Difficulties in implementing Convention standards may also be due to a conservative approach to the implementation of international legal acts, or to the political dimension of the principle of State sovereignty.

15. Four statistical indexes are used to identify the States with major structural/systemic deficiencies.

16. The first is the index of allocated applications pending before the Court, including the new applications in 2011. The data extracted from the Court's Annual Report from 2011 show that, on 31 December 2011, four States Parties accounted for over half (54.3%) of its docket: 26.6% of the pending cases concerned Russia, 10.5% – Turkey, 9.1% – Italy, and 8.1% – Romania.[23] The pending applications lodged against Ukraine constituted 6.8% of all pending applications, and those lodged against Serbia – 4.5%, against Poland – 4.2%, against the Republic of Moldova – 2.8%, and against Bulgaria – 2.7%.[24] Thus, in 2011 the following nine States Parties to the Convention – the Russian Federation, Turkey, Italy, Romania, Ukraine, Serbia, Poland, the Republic of Moldova and Bulgaria – accounted for 75.3% of the Court's workload. According to the Court's statistics for 2011, the global number of new applications allocated to a judicial formation amounted to 64 547.[25] The following States Parties had the highest number of new applications in 2011: Russian Federation, Turkey, Romania, Poland, Italy, Ukraine, Serbia, Sweden, Germany and France.[26]

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18. "The Pilot-Judgment Procedure", Information note issued by the Registrar of the European Court of Human Rights, 2009, paragraph 3.
19. In the 5th Annual Report 2011, they have been grouped together with leading cases; see p. 31.
20. 4th Annual Report, op. cit. That said, the Committee of Ministers stresses that it may sometimes be difficult to establish this when the case is examined for the first time (for example, it may happen that a case initially qualified as "isolated" is subsequently re-qualified as "leading" in the light of new information attesting to the existence of a general problem).
21. See Statistical information of the European Court of Human Rights.
22. See Execution of Judgments of the European Court of Human Rights, Publications of the Committee of Ministers.
23. Annual Report 2011 by the Registry of the European Court of Human Rights, 2012, p. 153.
24. Ibid.
25. Analysis of Statistics 2011 by the European Court of Human Rights, January 2012, Table 2: Applications allocated per Contracting State and population, p. 12.
26. See Appendix 1.

17. The second important statistical index is the number of applications allocated by population, that is by 10 000 inhabitants. Given that "the Council of Europe member States had a combined population of about 819 million inhabitants on 1 January 2011", "[t]he average number of applications allocated per 10 000 inhabitants was 0,79 in 2011".[27] States Parties whose applications allocated by population index has been the highest are not necessarily those with the highest number of applications. In 2011, the following States Parties had the highest number of applications in relation to their population: Serbia (5.10), Montenegro (5.02), Republic of Moldova (2.88), Croatia (2.69), Estonia (2.58), Liechtenstein (2.50), Romania (2.43), Monaco (2.42), Slovenia (2.08), and Sweden (2.02).[28] The above list does not include any of the States Parties yielding the biggest caseload in absolute terms, with the exception of Romania, namely the Russian Federation, Turkey, Poland, Ukraine and Italy.

18. The third index discloses the number of pilot (and quasi-pilot judgments) per State Party. According to the new working methods adopted by the Committee of Ministers in December 2010 at the 1100th meeting of the Ministers' Deputies,[29]pilot judgments and other judgments disclosing major structural or complex problems, as identified by the Court, are examined by the Committee of Ministers under the "enhanced supervision procedure", which means that the progress of execution is regularly followed by the Committee of Ministers at its human rights meetings. If we use the quasi-pilot and pilot judgments as indicators of the above-mentioned problems, we should pay attention to the presence of these problems in the States which are not included in the list of States yielding the highest number of applications lodged before the Court in absolute terms). For example, with respect to the length of civil proceedings – Germany (judgment *Rumpf v. Germany*[30]), Slovenia (*Lukenda v. Slovenia*[31]); the prisoners' right to vote in the United Kingdom (judgment in *Greens and MT v. the United Kingdom*[32]). Unfortunately, a statistical analysis of pilot and quasi-pilot judgments per State Party is absent from the European Court of Human Rights' Analysis of Statistics.

19. The fourth index refers to the number of judgments pending execution before the Committee of Ministers. The Committee of Ministers' supervision has been based over the last years on "action plans" drawn up by the respondent States in accordance with the principle of subsidiarity, and the State's margin of appreciation as regards the means of execution.[33] Since 2011, the Committee of Ministers examines cases under a new twin-track system, which means that all cases are examined under the "standard supervision procedure" (in which the Committee of Ministers' intervention is limited) unless, because of its specific nature, a case requires consideration under the above-mentioned "enhanced supervision procedure".[34] Unfortunately, the Committee of Ministers does not separate statistical analysis with respect to enhanced supervision procedures.[35]

3.2. Overview

3.2.1. Excessive length of judicial proceedings

20. The problem of the excessive length of judicial proceedings is widespread in criminal, civil, and administrative cases, and is usually accompanied by a lack of effective remedies. For example, in Italy, the problem is exacerbated by the fact that the "Pinto compensation" practice of implementation (a law which was enacted in 2001 to provide compensation for victims of unreasonably long judicial proceedings) has created a new structural problem – the problem of the excessive length of compensation proceedings. Almost 4 000 cases in Italy involve delays in paying "Pinto compensation".

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27. Annual Report 2011, op. cit.
28. Analysis of Statistics 2011, op. cit.
29. See notably, "Outstanding issues concerning the practical modalities of implementation of the new twin track supervision system", Information document by the Department of the Execution of Judgments of the European Court of Human Rights, CM/Inf/DH(2010)45 final of 7 December 2010, paragraph 10.
30. Application No. 46344/06, judgment of 2 September 2010.
31. Application No. 23032/02, judgment of 6 October 2005.
32. Applications Nos. 60041/08 and 60054/08, judgment of 23 November 2010.
33. "Implementation of judgments of the European Court of Human Rights", reply from the Committee of Ministers to Assembly Recommendation 1955 (2011), Doc. 12801.
34. Ibid, paragraph 2.
35. For general information on the execution of judgments, see "Execution of Judgments of the European Court of Human Rights". To verify the status of a particular case, see also "Pending cases: current state of execution," Database of cases pending before the Committee of Ministers.

21. At its 1136th meeting in March 2012, the Committee of Ministers demanded that "additional large-scale measures" be adopted, as it believed the situation was "deeply worrying", constituted "a serious danger for the respect of the rule of law, resulting in a denial of rights enshrined in the Convention", and created "a serious threat to the effectiveness of the system of the Convention".[36]

22. Possible causes of this structural/systemic problem are, in particular, complex national procedures and deficiencies in the practical functioning of the judiciary, including lack of budgetary resources.

23. Possible general measures aimed at improving procedural laws could be taken to address the causes of the excessive length of judicial proceedings, such as:

– introducing remedies aimed specifically at speeding up criminal proceedings;
– employing the "concentration principle" whereby evidence is brought together in first instance proceedings (Bulgaria,[37] Ukraine);
– changing the character of second instance proceedings from "second first instance" proceedings to proper appeal proceedings;
– limiting the grounds for lodging a further appeal to the Supreme Court;
– simplifying summons arrangements by introducing the possibility of serving a summons by delivering it to a person's mailbox or affixing it to that person's front door (Bulgaria[38]);
– modifying and reducing the scope of the supervisory review procedure and the related issue of impartiality (Russia, Ukraine);
– introducing a minimal court fee in proceedings as an administrative measure to deter manifestly ill-founded applications;
– simplifying specific procedures, including civil proceedings by limiting the types of civil proceedings to three (Italy);[39]
– rationalising and accelerating proceedings before administrative courts and streamlining provisions (Greece);
– introducing "participative proceedings", namely the obligation to appoint a representative when the number of parties to a case reaches a certain level (20 for example).

24. Measures to expand an effective remedy to expedite proceedings provide that, if a court does not take a procedural step in due time, the parties may at any time apply to the superior court for a time-limit to be set for the taking of the procedural step in question, thus affording a remedy designed to speed up the proceedings.[40]

25. In any event, awareness-raising measures for judges and other authorities are of crucial importance. States should ensure the translation of judgments of the European Court of Human Rights into the local language, their wide dissemination and official publication, possibly on the website of the competent authority, such as the Ministry of Justice. Additional measures could be taken to improve the administration of courts,[41] such as:

– establishing assessment and monitoring mechanisms, particularly through the collection and analysis of statistical data (Bulgaria);
– reducing the length of trials and introducing simplified procedures for judicial review;
– digitalising case files, allowing for easier, faster access (Italy and Turkey);[42]

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36. For example, see "Ceteroni Group of cases v. Italy", Decisions by the Deputies in "1136th Meeting (DH), 6-8 March 2012: Annotated order of Business and decisions adopted", CM/Del/Dec(2012)1136 of 13 March 2012.
37. According to Article 266 of the Civil Procedure Code, "in an intermediate appellate review proceedings, the parties may not allege new circumstances, cite and present evidence which the said parties could have cited and presented in due time in the first-instance proceedings".
38. See Article 47 of the Civil Procedure Code.
39. See Action plan concerning the Ceteroni group of cases v. Italy (Application No. 22461/93), DH-DD(2011)898F of 25 October 2011.
40. For instance, Poland's law on complaints against excessive length of proceedings of 2004.
41. As indicated by the Polish parliamentary delegation, the Polish authorities regularly translate, publish and disseminate Court judgments and also applies some of the additional measures mentioned below. In Turkey, the website www.inhak.adalet.gov.tr was launched in order to facilitate access to the Court's case law in Turkish.

- introducing a uniform method of managing civil case files in appellate courts and tribunals (Italy, end of March 2011);[43]
- circulating best practices widely;
- increasing the number of judges.[44]

26. Measures could also be put in place to compensate for damages caused by the excessive length of judicial proceedings. In criminal law, there are certain forms of non-pecuniary damages that could be implemented, such as the ability to mitigate penalties in cases of excessively lengthy proceedings (Bulgaria). Also, legislation could provide compensation for such damages caused by overly protracted proceedings (Poland, Greece and the Russian Federation). In Poland, for instance, to deal with Article 13 violations, a reformed domestic remedy for overly long proceedings entered into force on 1 May 2009, introducing *inter alia* an increase in the level of compensation for delay. Nevertheless, flaws remain in the application of compensation laws. For example, in Italy the duration of the compensation proceedings themselves is excessively long,[45] and in Poland the amount of compensation awarded is not always in line with the requirements of the European Court of Human Rights.[46]

27. Only one State, Poland, has so far received a positive evaluation from the Committee of Ministers. The Committee of Ministers noted with interest Poland's action plans submitted on 22 and 23 November 2011,[47] the "significant number of measures taken to address this systemic problem" of excessively lengthy proceedings (notably, the "computerisation of proceedings", and further legal amendments aimed at the acceleration of proceedings), as well as the authorities' "regular monitoring of courts' caseloads and the comprehensive statistics submitted.[48]" The Committee of Ministers also noted the commitment of the Polish authorities to closely monitor the implementation and impact of these measures with a view to assessing their effectiveness, in particular with regard to the functioning of the new domestic remedy.[49]

28. I agree with the Committee of Ministers' approach. It is crucial that States Parties uphold and fulfil their political commitment to resolving the problem of the excessive length of judicial proceedings, as well as take all necessary technical and budgetary measures to do so. I strongly encourage States dealing with this problem to undertake interdisciplinary action co-ordinated at the highest political level, involving all main judicial actors, with a view to urgently drawing up an effective strategy.[50]

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42. Action plan concerning the Ceteroni group of cases, op. cit. According to the information received from the Turkish delegation, the Turkish Judicial Network (UYAP), an electronic network connecting courts, public prosecutors' and law enforcement offices and the Ministry of Justice, allows easy access to relevant judicial documents.
43. Ibid.
44. Ibid.
45. www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=gaglione&StateCode=ITA&SectionCode=.
46. *Zwozniak v. Poland*, Application No. 25728/05, judgment of 13 November 2007.
47. For example, see Action plan concerning the Fuchs group of cases v. Poland (Application No. 33870/96), DH-DD(2011)1073E of 24 November 2011.
48. "Supervision of the execution of judgments and decisions of the European Court of Human Rights," Annual report, 2011 by the Committee of Ministers, April 2012, p. 70.
49. Ibid.
50. See "Execution of judgments of the European Court of Human Rights concerning the excessive length of judicial proceedings in Italy", interim resolution by the Committee of Ministers, CM/ResDH(2010)224 of 2 December 2010.

3.2.2. Chronic non-enforcement of domestic judicial decisions

29. The problem of non-enforcement of final domestic judgments is a major problem in the Republic of Moldova,[51] Romania,[52] Russia[53] and Ukraine,[54] and concerns the absence of effective legal remedies for such violations (such as compensation for the violation).

30. Possible causes of this structural/systemic problem are:

– deficient legislation and administrative practices;

– delays in legislative changes;

– inefficiency of the bailiff system;

– lack of co-ordination between enforcement agencies;

– failure of the courts to identify the debtor clearly.

31. The following examples of general measures show how States Parties tackle this structural problem:

– The Moldovan government has taken concrete measures to eliminate this systemic problem by introducing special legislation in July 2011 regarding non-enforcement of final domestic judgments and unreasonable length of proceedings.[55] Non-enforcement nevertheless remains a reality in the Moldovan bailiff system.[56]

– Similarly, the Romanian authorities have adopted some positive measures in this area. In October[57] and November 2011,[58] they submitted two revised action plans with information on the reforms carried out in response to the Strasbourg Court's judgments. It is indicated in particular that an inter-ministerial group prepared a draft law with a view to rendering the restitution and compensation process more effective, and a calendar for the adoption of the draft law was provided. At this stage, however, the calendar provided does not indicate whether the anticipated measures can be put in place before the expiry of the 18-month deadline set by the pilot judgment. As regards the progress of the restitution and compensation process, the data submitted do not afford a clear view of the overall number of claims that are yet to be satisfied, as they only concern part of the restitution laws which have governed these issues thus far. Since Mr Pourgourides' above-mentioned report of December 2010, the *Proprietatea Fund*, set up by Romania to deal with the payment of compensation awarded to owners of nationalised property, remains unlisted on the stock exchange (a measure which was due to take place in 2005,

51. In response to the Moldovan situation as regards the non-enforcement of local judgments, the Strasbourg Court delivered a pilot judgment in the case of Olaru and Others v. Moldova, Applications Nos. 476/07, 22539/05, 17911/08, and 13136/07, judgment of 28 July 2009.
52. Similarly, the Strasbourg Court issued pilot judgments in response to Romania's problems with non-enforcement. See Sabin Popescu v. Romania, Application No. 48102/99, judgment of 2 March 2004, and Sacaleanu v. Romania, Application No. 73970/01, judgment of 6 September 2005.
53. The importance of this issue for the Russian Federation was underlined in the pilot judgment of Burdov v. Russian Federation (No. 2), Application No. 33509/04, judgment of 15 January 2009. See also "Execution of the judgments of the European Court of Human Rights in 145 cases against the Russian Federation relative to the failure of serious delay in abiding by final domestic judicial decisions delivered against the State and its entities as well as the absence of an effective remedy", interim resolution by the Committee of Ministers, CM/ResDH(2009)43 of 19 March 2009, and "Execution of the pilot judgment of the European Court of Human Rights in the case of Burdov No. 2 against the Russian Federation relative to the failure or serious delay in abiding by final domestic judicial decisions delivered against the State and its entities as well as the absence of an effective remedy", interim resolution by the Committee of Ministers, CM/ResDH(2009)158 of 3 December 2009.
54. In October 2009, the Strasbourg Court delivered a pilot judgment on this issue in the case of Yuriy Nikolayevich Ivanov v. Ukraine, Application No. 40450/04, judgment of 15 October 2009, where the Court ordered Ukraine to introduce an effective remedy for what it identified as structural problems in the country's legal system, namely, the prolonged non-enforcement of final domestic judgments and the absence of an effective domestic remedy to deal with this situation. On 21 February 2012, the Strasbourg Court took the decision to resume the examination of applications raising similar issues.
55. *Balan v. Moldova*, judgment of 12 February 2012:
http://cmiskp.echr.coe.int/tkp197/view.asp?action=open&documentId=900507&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649.
56. See also Ministers' Deputies information document CM/Inf/DH(2010)15, 22 March 2010, Round Table on "Effective remedies against non-execution or delayed execution of domestic court decisions".
57. Revised action plan (October 2011) DH-DD(2011)908F (in French): https://wcd.coe.int/ViewDoc.jsp?id=1859303.
58. Revised action plan (November 2011) DH-DD(2011)1039F (in French): https://wcd.coe.int/ViewDoc.jsp?id=1870679.

according to Romania Law No. 247/2005). The Fund has, however, been paying dividends to its shareholders since 2007, and since March 2008 its shares may be sold by means of direct transactions under the supervision of the stock exchange regulatory authority.[59]

– The Committee of Ministers recognised as a delayed but positive and effective remedy the Russian Federation's adoption of two federal laws providing a new domestic remedy for excessive length of judicial proceedings and delayed enforcement of domestic judgments delivered against the State ("the Compensation Act"), as well as the Russian authorities' (in particular the federal Supreme Court, the Supreme Commercial Court, the Ministry of Finance, and Federal Treasury's) implementation of measures to guarantee the effectiveness of the new compensation remedy at a domestic level. In addition, the Committee of Ministers welcomed the comprehensive measures taken by the Russian Federation with a view to settling similar individual applications lodged prior to the pilot judgment *Burdov v. Russian Federation (No. 2)*, allowing the Court to strike 800 cases from its docket. The Committee of Ministers recalled nevertheless that the Russian Federation remained under the obligation to adopt other general measures, bearing in mind the Court's findings as set out in the pilot judgment, in order to fully address the issue of non-execution of judicial decisions under examination in the context of the Timofeyev group of cases, to which the *Burdov No. 2* case was henceforth joined.[60]

– The law "on State guarantees concerning execution of judicial decisions", adopted by the Ukrainian Parliament on 5 June 2012 and which will come into force on 1 January 2013, provides a new procedure for the enforcement of judicial decisions delivered against the State. The essence of this new procedure would be that the State would undertake to execute a judgment at the expense of the State budget if the debtor concerned, that is the State, local body, or enterprise, failed for whatever reason to comply with the judgment. If some delay still occurred, automatic compensation would be payable. At its 1144th June 2012 human rights meeting, the Committee of Ministers welcomed the adoption of this law and encouraged the Ukrainian authorities to continue their efforts with a view to resolving the problem of non-execution of domestic judicial decisions.[61]

3.2.3. Deaths and ill-treatment attributable to law enforcement officials, and a lack of effective investigations thereof

32. Mr Pourgourides' above-mentioned report identified chronic violations of Article 3 of the Convention, particularly in Turkey and the Russian Federation. In its latest observations on Bulgaria, the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), noted that ill-treatment by police remains a widespread phenomenon; consequently, the Bulgarian authorities have taken comprehensive (legislative) measures to deal with it.[62] According to Mr Pourgourides, the cases of death and ill-treatment attributable to law enforcement officials concern the shortcomings of national procedures (some of which are still pending) and/or investigations conducted into abuses committed by security forces, particularly the mistreatment or deaths of applicants or their relatives in circumstances engaging State responsibility. Furthermore, in most of those cases, the States were found to have failed to conduct effective investigations.[63]

33. The European Court of Human Rights pointed out procedural deficiencies of the investigations, which have resulted in virtual impunity of members of the security forces, as possible causes of this structural/ systemic problem. Those procedural deficiencies are:

– the excessive length of investigations against State officials involved;

– the lack of independence of the authorities who conducted those investigations;

– the impossibility for applicants to have access to the records of the investigations;

– the impossibility for the applicants to interview witnesses and accused officers;

– impunity resulting from the application of statutes of limitations and amnesty laws;

59. *Maria Atanasiu and others v. Romania*, Application No. 30767/05, judgment of 12 December 2010, paragraph 78.
60. Supervision of the Execution of Judgments 2011, Annual Report, p. 73.
61. Decision of 6 June 2012: https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec(2011)1144/25.
62. See, in particular, amendments to the Minister of Interior Act, which entered into force on 1 July 2012. They introduced an "absolute necessity" standard on the use of weapons, physical force and auxiliary means by police staff.
63. Concerning Bulgaria, see Interim Resolution CM/ResDH(2007)107 of 17 October 2007: https://wcd.coe.int/ViewDoc.jsp?Ref=CM/ResDH(2007)107&Language=lanEnglish.

- decisions of deferment of judgment or stays of execution of sentences issued against the accused officers;
- failure to suspend State officials from their duties despite the existence of proceedings against them for abuse;
- the lack of medical expertise prepared in good time;
- the lenient sentences imposed on police officers;
- conditional dismissals that applied to officers convicted of abuse.[64]

34. In addition, general measures have been proposed, such as:

- The Committee of Ministers has recommend that the Bulgarian Government take further measures to ensure the proper investigation of certain individual cases, procedural safeguards during police custody and civil society monitoring mechanisms. Bulgaria has also been requested to provide further information on the content of training and awareness-raising measures on human rights standards for law enforcement officials.[65] Certain recently adopted or amended decrees and other legislation[66] were regarded as falling short of Convention standards[67] and more detailed information regarding measures envisaged or already adopted to ensure the effectiveness of investigations was requested.[68] The Committee for the Prevention of Torture stressed that the problem of ill-treatment by police officers persisted, and recommended that the Minister of Internal Affairs of Bulgaria deliver a firm message of "zero tolerance" of ill-treatment to all police staff, to be backed up by appropriate training programmes.[69] According to the Bulgarian parliamentary delegation,[70] the Ministry of Interior is taking several awareness-raising measures on human rights standards, in particular through its Academy, which trains the Ministry's staff in the area of the protection of security and public order.
- The Moldovan authorities adopted a number of measures, notably in response to the concerns raised by the CPT. Amendments were introduced to the Criminal Code, and in 2006 the Code of Police Ethics was approved by the government.[71]
- The Russian Federation's new law on police enforcement entered into force in March 2011. In its last specific decision of December 2010, the Committee of Ministers encouraged the Russian authorities to fully seize the opportunity offered by Russia's ongoing comprehensive reform to ensure that the legal and regulatory framework for police activities contains all necessary safeguards against police arbitrariness and abuses, like those found by the European Court of Human Rights in its judgments. The new system put in place is presently under examination by the Committee of Ministers.
- Turkey's Ministry of Justice organised the "High Level Conference and Workshop on Decisions of the European Court of Human Rights on Turkey, Issues and Solutions" in November 2011. At the meeting, Turkey notified the participants that questions concerning effective investigations and prosecutions would be reconsidered in the framework of professional training projects for judges and prosecutors, in collaboration with the High Council of Judges and Prosecutors and the Academy of Justice. The authorities also noted that according to the provisions of the new Criminal Code, the prescription

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64. Appendix for the group of cases Batý: https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/OJ/DH(2010)1100&Language=lanEnglish&Ver=prel0019&Site=.
65. See Ministers' Deputies Information Documents on the Velikova group against Bulgaria, CM/Inf/DH(2011)23, 10 May 2011: https://wcd.coe.int/ViewDoc.jsp?id=1785037;
    and on the group of cases Nachova against Bulgaria, CM/Inf/DH(2011)24rev, 30 May 2011: https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Inf/DH%282011%2924.
66. Bulgaria Decree on the use of force and arms by the military police, adopted on 9 September 2009 and Section 74 of the 2006 Ministry of Internal Affairs Act concerning use of fire-arms by the police. For a detailed discussion see in particular: www.bghelsinki.org/en/publications/obektiv/obektiiv/2011-08/police-brutality-between-collegial-solidarity-and-public-interest/.
67. Communication from an NGO and reply of the government, DD(2011)298, 26 April 2011: https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1831918&SecMode=1&DocId=1731112&Usage=2.
68. See decisions concerning these two groups of cases taken at 1115th (DH) meeting on 7-8 June 2011, in CM/Del/Dec(2011)1115 of 10 June 2011, pp. 20 and 23: https://wcd.coe.int/ViewDoc.jsp?id=1799029&Site=CM.
69. CPT report of 15 March 2012: www.cpt.coe.int/documents/bgr/2012-09-inf-eng.htm.
70. Letter of 10 September 2012, on file with the Secretariat.
71. The CPT published its further report on 12 January 2012: www.cpt.coe.int/documents/mda/2012-03-inf-fra.htm (in French).

periods for different crimes linked with ill treatment and torture had been increased to a significant degree.[72]The *Batý v. Turkey*[73] group of cases, however, highlights the problem of impunity of law enforcement officials.

– Similarly, the Ukrainian authorities have adopted a number of measures to prevent new, similar violations. On 12 January 2005, a number of amendments were introduced to the Law on the Militia. Ukraine is also expecting improvements stemming from the recent adoption of the new Code of Criminal Procedure, whose new Articles 176-179, 181, 203, 204, 207, 211, 212, 214 specifically target "the practice of unregistered detention by police" and "the use of administrative arrest for criminal investigation purposes".[74] In addition, measures have been taken to strengthen professional and in-service training of police officers in human rights by including the study of the Convention's requirements and the case law on Article 3 in the curriculum of educational establishments under the Ministry of Internal Affairs and the National Academy of Prosecutors. Problems of ill-treatment were also discussed during training programmes for judges and law-enforcement bodies organised by the Office of the Government Agent and NGOs.

3.2.4. Unlawful detention and excessive length of detention on remand

35. The problem of illegal detention and excessive length of detention on remand is common in criminal cases, and is usually accompanied by a lack of effective remedies. The problem of detention in the Republic of Moldova has been featured in the leading case of *Brega v. Moldova*,[75] which unites seven pending cases. Similarly, the Trzaska group of cases,[76] consisting of 151 pending cases, concerns the excessive length of detention on remand in Poland. In Ukraine, unlawful and/or excessively long pre-trial detention is also a structural deficiency. The Court delivered a "quasi-pilot" judgment in February 2011 in the case of *Kharchenko v. Ukraine*.[77] With respect to Turkey, the leading group of cases identifying violations of the Convention due to excessively long periods of detention on remand as a major problem is *Halise Demirel v. Turkey*[78] and the Court rendered a quasi-pilot judgment in *Cahit Demirel v. Turkey*.[79] Moreover, there have been numerous cases against the Russian Federation, as identified in Interim Resolution CM/ResDH(2010)35,[80] concerning violations of Article 5 of the Convention due to the unlawful detention of the applicants, its excessive length in the absence of relevant and sufficient grounds for prolonged detention and the lack of effective judicial review of the lawfulness of detention.

36. Possible causes of this structural/systemic problem are:

– the prevailing mentality, professional practice in the judiciary, and lack of motivation;

– the domestic courts' failure to provide "relevant and sufficient" grounds for their decisions ordering or prolonging detention on remand;

– the domestic courts rendering judgments without taking into consideration the Convention's requirements;

– the police's wide-spread practice of unregistered detention;

– failure to bring the arrested person before a judge promptly;

– failure to consider alternative preventive measures;

– inadequate domestic legislation;

– lack of a clear procedure allowing for the speedy review of the lawfulness of detention on remand;

– absence of a domestic remedy letting applicants challenge the lawfulness of their detention on remand;

72. According to the information provided by the Turkish delegation, an "Action Plan on Preventing Human Rights Abuses" was prepared by the Ministry of Justice following the high-level conference.

73. Main cases Baty group and other similar cases, Application No. 33097/96 judgment of 3 June 2004, see DH-DD(2011)559. Number of cases concerned: 71.

74. http://portal.rada.gov.ua/rada/control/en/publish/article/info_left?art_id=307141&cat_id=105995.

75. *Brega v. Moldova*, Application No. 52100/08, judgment of April 20, 2010.

76. *Trzaska v. Poland*, Application No, 25792/94, judgment of 11 July 2000.

77. *Kharchenko v. Ukraine,* Application No. 40107/02, judgment of 10 February 2011.

78. Main cases Demirel group; *Demirel v. Turkey* and other similar cases, Application No. 39324/98, judgment final on 28 April 2003, DH-DD(2011)578. Number of cases concerned: 152.

79. Cahit Demirel v. Turkey, Application No. 18623/03, judgment of 7 July 2009, paragraph 46.

80. Interim Resolution CM/ResDH(2010)35 of 4 March 2010, Execution of the judgments of the European Court of Human Rights in 31 cases against the Russian Federation mainly concerning conditions of detention in remand prisons.

– absence of a right to compensation for unlawful detention on remand.

37. The States Parties concerned have implemented or plan to implement the following general measures to solve this structural problem:

– The Polish authorities have made substantial changes in their State's legal system in order to clarify the rules on the imposition and extension of detention, and to introduce and promote alternative measures. For instance, the Code of Criminal Procedure was reformed in 1997, 2000 and 2007. In 2011, in addition to their regular monitoring of the overall detention situation, the authorities also introduced closer supervision of the grounds for and length of detention, as well as of the efficient conduct of the relevant criminal proceedings.[81]

– The Code of Criminal Procedure, Law No. 5271, which came into force on 1 June 2005 in Turkey, provides safeguards intended to prevent future violations of the same kind.

– On 9 November 2011, the Ukrainian authorities presented an action plan that provided a strategy for taking legislative measures, as well as administrative measures aimed at changing detention practices. Emphasis was put on the adoption of a new Code of Criminal Procedure in 2012, which, according to the authorities, would eliminate the legislative shortcomings underlying the recurrent violations of Article 5, paragraphs 1, 3, and 4 of the Convention. The new Code of Criminal Procedure was adopted in April 2012.

– Similarly, on 9 February 2012, the Russian authorities submitted an action plan.[82] The Constitutional Court and the Supreme Court also adopted a number of decisions in an effort to remedy the existing uncertainty as to the legal provisions governing detention pending extradition.[83] They provided the lower courts with guidelines and clarifications on how to apply the general provisions to suspects and to accused persons in detention on remand, as well as to persons detained pending extradition. Since 2008, these decisions have been supplemented by instructions issued by the General Prosecutor's Office. The General Prosecutor's Office also clarified how a detainee's risk of possible ill-treatment in countries requesting extradition should be assessed by prosecutors when issuing an extradition order. In addition, the Russian authorities are currently considering the need for legislative amendments with a view to bringing the Code of Criminal Procedure into line with the Convention's requirements.

38. Moreover, States Parties, if they have not yet done so, should take the general measures needed to change detention enforcement practices. Domestic courts must give relevant and sufficient reasons to justify continued detention, and take into consideration the particular circumstances of each case. Domestic courts are also expected to refrain from giving formulaic decisions and take into account the case law of the Strasbourg Court.

– In Turkey, for example, when deciding whether to extend detention on remand, a domestic judge should indicate the presence of "relevant and sufficient reasons" for doing so, that is explain to what extent the applicant's release would still pose a risk after the passage of some time, in particular in the later stages of the court proceedings.[84]

– The decisions of the Supreme Court of Justice of the Republic of Moldova upholding the need for judicial decisions to be made in light of the Strasbourg Court's findings are a welcome step. These decisions demonstrate the increased attention paid by the Moldovan judicial community to resolving this important issue. However, increased efforts are needed to effectively change the judiciary's daily practice,[85] and it is not yet clear whether the guidelines contained in the decisions of the Supreme Court of Justice are binding on lower courts. Clarification with regard to this matter would be useful. Consequently, the Republic of Moldova was invited to submit to the Committee of Ministers an action plan on the implementation of the relevant judgments of the Court. Such an action plan is still awaited from the Moldovan authorities.

– At its 1136th human rights meeting in March 2012, the Committee of Ministers noted with satisfaction the progress achieved by the Polish authorities.[86] A positive trend is visible in recent detention statistics, and Polish courts increasingly appear to be applying alternative measures to detention. The

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81. A summary of measures adopted up to 2007 is set out in Interim Resolution CM/ResDH(2007)75 and the subsequent measures are listed in the action plan submitted by the authorities on 21 November 2011.
82. DH-DD(2012)152.
83. Decision of 1 March 2007 and by the Supreme Court ruling of 29 October 2009.
84. See, for example, *Mehmet Yavuz v. Turkey*, paragraphs 39 and 40.
85. See Ministers' Deputies information document CM/Inf/DH(2009)42 rev, 30 November 2009, Measures required to comply with the judgments concerning detention on remand in Moldova.

Committee of Ministers also welcomed the commitment of the authorities to resolving this issue, as shown by the continued monitoring of the length of and grounds for pre-trial detention, as well as by the training activities for judges and prosecutors. The Committee of Ministers invited the authorities to continue their efforts in relation to training and awareness-raising measures, in particular as regards the promotion of alternate measures to detention and the further reduction of the use of medium- and long-term detention. As a result of the significant progress achieved and the commitment shown by the Polish authorities, it was decided that the supervision of the execution of this group of detention cases would continue under the standard procedure.[87] In addition, Polish authorities have taken steps to improve the judiciary's awareness of the Strasbourg Court's judgments concerning the excessive length of detention on remand.[88] The Ministry of Justice has contacted all the presidents of the appellate courts, and provided an analysis of the Strasbourg Court's case law pertaining to the requirements for the reasoning behind placing individuals in detention on remand.

– According to the most recent information, concerning the execution of the judgment in the case of *Kharchenko v. Ukraine*,[89] provided by the Ministry of Justice of Ukraine to our committee on 26 April 2012, the Ukrainian government has published and translated the judgment and has sent copies to the Supreme Court, the High Specialised Court of Ukraine for civil and criminal cases, and every Court of Appeal. It has also organised round table discussions on this matter with judges who decide whether pre-trial detention should be granted.

3.3. Parliamentary control

39. Over time, particularly from Resolution 1226 (2000) to Resolution 1787 (2011) on the implementation of Court judgments,[90] the Parliamentary Assembly's focus and recommendations shifted from being generalised towards being country-specific. Concurrently, single-country resolutions, such as Resolution 1297 (2002), and Resolution 1381 (2004) regarding Turkey, have given way to cluster resolutions examining implementation problems across several or all member States. The latter breed of resolutions has come to be focused on systemic implementation problems, and the legal and administrative structural deficiencies that underlie those problems. For background research, the Assembly continues to rely on its Committee on Legal Affairs and Human Rights, which remains seized of the subject.

40. A national parliamentary supervision system of the implementation of Strasbourg Court judgments is still an exceptional rather than a widespread practice. The United Kingdom's and the Netherlands' systems, which are most often referred to, are described in Mr Pourgourides' above-mentioned report.

41. The achievements in the sphere of national parliamentary scrutiny of four States Parties with structural deficiencies need to be mentioned:

– Romania has a parliamentary subcommittee, established in 2005, of the Committee on Legal Matters, Discipline and Immunities of the Lower Chamber, which monitors the implementation of adverse judgments of the European Court of Human Rights. This subcommittee organises joint hearings on legislative remedies with the governmental commission tasked with the implementation of the above-mentioned pilot judgment in *Maria Atanasiu and Others v. Romania*, monitors the implementation of other judgments finding violations of the Convention by Romania, and promotes and assists in legislative reforms. Since 2011, the government is legally obliged to submit a draft remedial law within three months of any adverse judgment that requires such a law, and to provide an accompanying statement on Romania's compliance with the Convention for each draft law affecting human rights, which it submits to parliament.

– Italy has a "joint permanent committee", established in 2009, of both the legislative and the executive branches, tasked with guiding parliament in its legislative work, by informing parliament about the specific requirements of the Convention and of relevant judgments of the Strasbourg Court, and by advising parliament on the need for the adoption or amendment of specific laws in order to comply with

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86. Decision of 8 March 2012 in the cases of *Trzaska and Kauczor v. Poland*: https://wcd.coe.int/com.instranet.InstraServlet?Index=no&command=com.instranet.CmdBlobGet&InstranetImage=2047576&SecMode=1&DocId=1866074&Usage=2.
87. www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=Trzaska&StateCode=POL&SectionCode=.
88. Interim Resolution CM/ResDH(2007)75 concerning the judgments of the European Court of Human Rights in 44 cases against Poland (see Appendix II) relating to the excessive length of detention on remand at: https://wcd.coe.int/ViewDoc.jsp?Ref=CM/ResDH%282007%2975&Language=lanEnglish.
89. Application No. 40107/02, judgment of 10 February 2011.
90. See also Resolution 1516 (2006) on the implementation of judgments of the European Court of Human Rights.

the Convention as interpreted by the Court. The government is legally obliged to continuously brief the parliament on Strasbourg Court judgments finding violations of the Convention by Italy, and, separately, to supply the parliament with an annual report on the state of the execution of these judgments. Specialised parliamentary committees are tasked with examining this information.

- Since 2006, the Ukrainian Parliament examines draft remedial laws tabled by the government and suggestions for the parliament's own drafting of legislation. The Parliamentary Ombudsman is also briefed on adverse European Court of Human Rights' judgments. In addition, building on the experience of two draft laws[91] that purported to bring about comprehensive national parliamentary control over law enforcement, a joint memorandum of understanding between the Committee on Justice of the Ukrainian Parliament and the then rapporteur of the Assembly's Committee on Legal Affairs and Human Rights, Mr Christos Pourgourides, was signed in 2009 that introduced an experimental mechanism for limited parliamentary scrutiny of Strasbourg Court judgments' implementation. This mechanism was to take the form of Committee on Justice meetings with the Government agent at the European Court of Human Rights and representatives of the Ministry of Justice, and result in the drafting of remedial laws and amendments based on the information and recommendations provided by the participants in those meetings. Moreover, the draft law "On amendments to the Law of Ukraine 'On the execution of judgments and implementation of practice of the European Court of Human Rights'"[92] is awaiting its second reading. It will introduce a new clause stipulating that the Verkhovna Rada exercises parliamentary control over the implementation of Court judgments. Those responsible for representing Ukraine before the Strasbourg Court and co-ordinating the implementation of its judgments[93] will be obliged to report to the Verkhovna Rada annually, no later than 1 March, about the state of implementation of the Court's judgments. They will also have to present proposals concerning general measures, particularly legislative amendments. The adoption of this draft law will establish procedures in line with the Council of Europe's standards.
- In Bulgaria, a Bill put forward by a group of parliamentarians (Civil Advocacy Initiative of the Institute of Modern Politics) ascribes similar obligations to the Bulgarian Assembly.[94] It will therefore be useful to follow closely this positive initiative.

4. Conclusion and proposals

42. The States Parties to the European Convention on Human Rights should amend their legislation to reflect the case law of the European Court of Human Rights, and should ensure that their relevant authorities, and in particular the judiciary, apply its case law, by giving priority to the judgments of the European Court of Human Rights over any national legislation that was found to be in contradiction with the Convention.

4.1. Measures to be taken at the stage of evaluating the admissibility of applications before the Court

43. The preparation of this report has shown that statistical information documenting a case's progression in the European Court of Human Rights, as well as a case's status as a "pilot judgment", "a quasi-pilot" judgment, or "leading case", is either not available or difficult to access. This means that at the stage of a case's "allocation to a judicial formation" and of making a decision on its admissibility, States Parties are in fact unable to take early, preventive action to eliminate structural/systemic deficiencies.

44. The creation of a general, comprehensive database of pending cases, applications, judgments, and information concerning the enforcement of judgments could remedy this lacuna. Such a database could use the comprehensive statistics of the Committee of Ministers, the European Court of Human Rights, as well as of the States Parties themselves. The Committee of Ministers, the European Court of Human Rights, and States Parties should all have full access to this database. States are in the dark about the Strasbourg Court's current volume of work, and the effectiveness of the various measures employed to address structural weaknesses. This database should help increase transparency with regards to structural weaknesses, eligibility criteria of the Court, and the statistics of the various governmental and inter-governmental bodies.

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91. Draft laws Nos. 3472(1999) and 3201(2003) on the basic principles of parliamentary scrutiny in Ukraine, proposed by the rapporteur.
92. Registration No. 9458, 15 November 2011.
93. At present, this body is the Government agent at the European Court of Human Rights.
94. Bill No. 254-01-41, document on file with the Secretariat [of 25 April 2012].

45. To reduce the number of applications lodged before the Court against certain States Parties to the Convention, several measures aimed at preventing the submission of obviously inadmissible applications could be taken, such as:

– establishing centres for the analysis of applications, with the help of non-governmental human rights organisations and in close co-operation with the Court's Registry, that are better equipped than the "Warsaw lawyer" project,[95] and contact national authorities, such as parliamentary committees, Ombudspersons, and government agents, to address the issues contained in applications, provide free expert assessments of applications' admissibility to the Court, and familiarise applicants with the Court's criteria and procedures;

– opening Council of Europe offices in all States Parties with major structural/systemic problems and/or with a high number of applications before the Court;

– organising meetings with civil society, bar associations, representatives of the academic community, delegations to the Parliamentary Assembly of the Council of Europe, former and/or present judges of the Court.

46. An effective remedy at the national level (preferably a compensatory one) should be available for individuals alleging that their rights guaranteed in the Convention have been violated. The existence of such a remedy is primordial in cases of alleged violations of the reasonable time principle in criminal, civil, and administrative proceedings.[96]Constitutional complaints could be an additional remedy that would need to be exhausted before lodging an application to the Strasbourg Court.

4.2. Measures to be taken at the stage of proceedings before the Strasbourg Court

47. The defending government should have the possibility to assess the prospects of success of the case against it on its merits at the initial communication stage, and to resolve the case by concluding a friendly settlement, paying just satisfaction, or applying to the competent national court for a review of the case. As stressed in the Izmir Declaration adopted at the High Level Conference on 26 and 27 April 2011, the viability of the Convention system falls within the scope of the shared responsibility of both the Court and the States Parties.[97] In the Izmir Declaration, States Parties to the Convention were also invited to "give priority to the resolution of repetitive cases by way of friendly settlements or unilateral declarations where appropriate".[98] While friendly settlements and unilateral declarations may certainly relieve the Court, they will not solve the major structural problems of States Parties in the long-term. More robust and comprehensive measures are needed at the national level.

48. To ensure that cases are dealt with within a reasonable amount of time, States Parties should make sure that the Registry of the Court has sufficient staff, and that the number of secondments is related to the number of applications lodged against the respondent State. The secondment of national judges to the Registry of the Court could be beneficial both to the Court and to domestic legal systems, as it would improve mutual understanding and enhance the national judges' knowledge of the Convention. The fact that an experienced national judge could work for a certain period at the Registry also has the potential to reinforce the operational efficiency of the latter. The secondment of national judges, as well as of other highly qualified lawyers, should therefore be strongly encouraged in the future, notably by simplifying administrative procedures.[99]It is important to note, however, that seconded national judges shall not receive instructions from their national governments.

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95. The Warsaw Lawyer. A Pilot project of the European Court of Human Rights, by Katarzyna Lakoma, Advocate, lawyer at the Information Office of the Council of Europe in Warsaw, 2004-2009, Third Informal seminar for government agents and other institutions on pilot judgment procedure in the European Court of Human Rights and the future development of human rights' standards and procedures. Warsaw, 14-15 May 2009, pp. 212-225.

96. In particular, the experience of some countries, like Poland, which introduced in 2004 a remedy against excessive length of judicial proceedings, should be considered. As indicated by the Turkish delegation, it is now possible for Turkish citizens to complain about human rights violations before the Constitutional Court.

97. Paragraph 6. Available at: www.coe.int/t/dghl/standardsetting/conferenceizmir/Declaration%20Izmir%20E.pdf.

98. Ibid., Part E, paragraph 1.

99. In the Interlaken Declaration of 19 February 2010, the High Level Conference on the Future of the European Court of Human Rights called upon the States Parties to the Convention to consider the possibility of seconding national judges or other high-level independent lawyers to the Registry of the Court, as part of the efforts to increase the awareness of national authorities of the Convention standards and to implement the Convention at the national level. This call was repeated in the Izmir Declaration of 27 April 2011, and was repeated in the Brighton Declaration,19 and 20 April 2012.

4.3. Measures to be taken at the stage of the execution of Court judgments

49. Competent authorities need to be defined in order to facilitate the execution of judgments. I agree with the conclusion in Mr Pourgourides' report:

> *"The problems revealed by the judgments of the Court are large-scale and complex in nature. Their resolution may sometimes go beyond the execution of a particular judgment. This can only be achieved through the setting up of a comprehensive strategy co-ordinated at the highest political level. Any delays in the setting up of such a strategy should be subject to close monitoring by parliament which should have appropriate means to compel the government to solve these issues as a matter of priority."*

50. A possible conflict of interest is created when the government agent for issues relating to the European Court of Human Rights is responsible both for representing the government before the Court and for the execution of the Court's judgments. To avoid such a conflict, a new position of agent for the execution of the judgments of the European Court of Human Rights could be created at the national level, mandated to:

– authoritatively systematise and generalise the Strasbourg Court's case law;

– assist in supervising the execution of the Court's judgments by the relevant authorities, in particular through parliamentary oversight;

– analyse and verify the causes leading to the violations of the Convention identified in the Court's judgments;

– implement individual and general measures, including through the elaboration of draft laws aimed at making States' legislation conform with the Convention and the Court's case law.

51. It is recommended that States with structural deficiencies establish a dual system of parliamentary control, with national parliamentary oversight as a primary instrument and the Parliamentary Assembly's monitoring as backup.

52. The criteria for assessing the efficiency of a State's national parliamentary oversight mechanism will be prescribed by the Assembly to all member States experiencing structural deficiencies, and shall include: regular information supplied by the government to the national parliament as prescribed by law, the parliament's assessment of the effectiveness of implementation measures taken by the executive, and the utilisation of both sources of information in legislative activity aimed at remedying and removing structural deficiencies.

53. The Assembly's duties would include:

– providing appropriate training opportunities;

– considering the reports provided by national delegations on the effectiveness of measures taken by States Parties to address their structural deficiencies, and the implementation of the Convention in law and in practice;

– providing advice on legislative provisions establishing these national parliamentary monitoring mechanisms in charge of overseeing the implementation of Strasbourg Court judgments and eliminating structural/systemic deficiencies, based on recognised best practices drawn from other States Parties.

54. This Committee's previous work has demonstrated the need for giving national parliaments an increased role in the execution of judgments.[100]Therefore, I believe that national parliaments, and in particular parliamentary committees on legal issues and justice, should be granted the authority to supervise the activities of the States' executive bodies, to enforce the judgments of the European Court of Human Right, to elaborate special means, both organisational and legal, to exert influence on States Parties' governments in the face of recurring violations, in particular in cases of delayed execution of the Court's judgments. Parliamentary committees on legal issues should also be responsible for providing legislative support to the Court's pilot judgments, and supervising their execution.

55. Any restrictions to applicants' access to national courts for the review of their case after a final judgment of the Court should be eliminated, and a time period for such a review should be established in the relevant criminal and civil legislation.

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100. See, in particular, Mr Pourgourides' report on "National parliaments: guarantors of human rights in Europe", Doc. 12636.

4.4. Measures aimed at the elimination of structural/systemic deficiencies in States Parties

56. Most of the measures aimed at the elimination of structural/systemic problems may be taken within the framework of the execution of judgments of the European Court of Human Rights, under the supervision of the Committee of Ministers.

57. The Court could identify structural/systemic issues at a national level more directly and join applications related to the same systemic problem. If the Court adjudicates repetitive cases separately, it could standardise and shorten judgments in order to save its resources for more challenging cases. The judge from the relevant State Party should identify the cases raising important, systemic legal issues in order to prioritise these cases, secure prompt consideration and put an end to continuing violations.

58. However, the legal guarantees for the independence of the Court's judges must be strengthened. Under Article 51 of the Convention, the judges of the Court are entitled to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe (ETS No. 1) and in the agreements made thereunder. Similarly, under Article 1 of the Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe (ETS No. 162), the judges of the Court and their families are granted the privileges, immunities, exemptions, and facilities accorded to diplomatic envoys in accordance with international law, in addition to the privileges and immunities specified in Article 18 of the General Agreement (ETS No. 2). In practice, however, some issues remain unsettled, and sometimes the authorities act in contravention of the above provisions. Thus, all States Parties' legislation should clearly indicate that judges of the European Court of Human Rights and their families have diplomatic immunity *ad vitam,* as well as possess diplomatic passports, and States Parties should strictly comply with requirements related to that diplomatic immunity by providing to judges of the Court immunities, exemptions, and facilities accorded to diplomatic envoys and to judges of the highest level. A judge's term of office at the Court should be included in the national employment record in judicial or other occupation. After the replacement of a judge of the Court, the relevant State Party should secure the former judge a similar position if he or she has not yet reached retirement age. States can take as a model, in particular, the good practice of the United Kingdom, where a former judge is entitled to the position of a judge of the highest court or a similar position. When the former judge reaches retirement age, he or she should be entitled to a pension equivalent to that of judges of the highest courts or of State agents of similar positions.

59. Legal education and awareness-raising measures are also necessary to avoid further violations of the Convention, particularly in States Parties that joined the Council of Europe relatively recently and where knowledge of human rights issues remains scarce amongst decision makers and State organs.

60. The lack of systemic comprehension of the European Court of Human Rights' case law demonstrated by national authorities, particularly courts, law-enforcement bodies, and bar associations, points to those authorities' lack of knowledge and skills with regard to implementing the Strasbourg Court's case law. As stated by Mr Kotlyar at the committee meeting in Oslo on 7 June 2011, "profound changes in legal education and training of legal professionals are required to alter this in a long-term perspective".[101]

61. Thus, it would be advisable for member States to create a special official website and accessible database, containing official translations of the European Court of Human Rights case law, in particular those decisions, judgments, advisory opinions as well as guidelines (maybe even academic research) which are most pertinent to the country in question. Experts – lawyers by profession – should assist in the preparation of these translations in order to avoid the arbitrary use of legal terms and conflicting interpretations.

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101. Text of the speech on file with the Secretariat.

Appendix 1 – Total number of new applications allocated to a judicial formation[102]

No.	State	Applications allocated to a judicial formation in 2011	Allocated applications in 2011/population (10 000)
1	Russian Federation	12 465	0.88
2	Turkey	8 702	1.18
3	Romania	5 207	2.43
4	Poland	5 035	1.32
5	Italy	4 733	0.78
6	Ukraine	4 621	1.01
7	Serbia	3 730	5.10
8	Sweden	1 899	2.02
9	Germany	1 754	0.21
10	France	1 600	0.25
Total number of new applications		**64 547**	-

102. Extract from the Court's Analysis of Statistics 2011, p. 12.

Appendix 2 – List of the 29 pilot judgments delivered by the Court (data as at 12 November 2012)

Application No.	Case title	State	Decision body	State of proceedings	Subject	Judgment delivery date
31443/96	BRONIOWSKI v. Poland	POL	Grand Chamber	finished	compensation for property left beyond the Bug River	22/06/2004
23032/02	LUKENDA v. Slovenia	SVN	Chamber	finished	civil length of proceedings	06/10/2005
35014/97	HUTTEN-CZAPSKA v. Poland	POL	Grand Chamber	finished	state rent control	19/06/2006
33509/04	BURDOV v. Russia (No. 2)	RUS	Chamber	finished	non enforcement	15/01/2009
45219/06	KAUCZOR v. Poland	POL	Chamber	finished	length of judicial detention	03/02/2009
13136/07	RACU v. Moldova	MDA	Chamber	finished	non enforcement	28/07/2009
17911/08	LUNGU v. Moldova	MDA	Chamber	finished	non enforcement	28/07/2009
22539/05	GUSAN v. Moldova	MDA	Chamber	finished	non enforcement	28/07/2009
476/07	OLARU v. Moldova	MDA	Chamber	finished	non enforcement	28/07/2009
40450/04	YURIY NIKOLAYEVICH IVANOV v. Ukraine	UKR	Chamber	finished	non enforcement	15/10/2009
17885/04	ORCHOWSKI v. Poland	POL	Chamber	finished	conditions of detention	22/10/2009
27912/02	SULJAGIC v. Bosnia and Herzegovina	BIH	Chamber	finished	savings in BIH	03/11/2009
46344/06	RUMPF v. Germany	GER	Chamber	finished	civil length of proceedings	02/09/2010
30767/05	ATANASIU and POENARU v. Romania	ROM	Chamber	finished	restitution claims	12/10/2010
33800/06	SOLON v. Romania	ROM	Chamber	finished	non-payment of compensations due, restitution laws	12/10/2010
60041/08	GREENS v. the United Kingdom	UK	Chamber	finished	prisoners' right to vote	23/11/2010
60054/08	M.T. v. the United Kingdom	UK	Chamber	finished	prisoners' right to vote	23/11/2010
50973/08	VASSILIOS ATHANASIOU AND OTHERS v. Greece	GRC	Chamber	finished	administrative proceedings length	21/12/2010
2708/09	HAMANOV v. Bulgaria	BGR	Chamber	finished	criminal length of proceedings	10/05/2011
48059/06	DIMITROV v. Bulgaria	BGR	Chamber	finished	criminal length of proceedings	10/05/2011
37346/05	FINGER v. Bulgaria	BGR	Chamber	finished	civil length of proceedings	10/05/2011
42525/07	ANANYEV AND OTHERS v. Russia	RUS	Chamber	finished	conditions of detention	10/01/2012
60800/08	BASHIROV AND BASHIROVA v. Russia	RUS	Chamber	finished	conditions of detention	10/01/2012
24240/07	UMMUHAN KAPLAN v. Turkey	TUR	Chamber	awaiting referral request	civil length of proceedings	20/03/2012
54447/10	MICHELIOUDAKIS v. Greece	GRC	Chamber	awaiting referral request	civil length of proceedings	03/04/2012
26828/06	KURIC and Others v. Slovenia	SVN	Grand Chamber	finished	the erased	26/06/2012

Application No.	Case title	State	Decision body	State of proceedings	Subject	Judgment delivery date
604/07	MANUSHAQE PUTO AND OTHERS v. Albania	ALB	Chamber	awaiting referral request	non-enforcement of administrative decisions awarding compensation for confiscated property	31/07/2012
40150/09	GLYKANTZI v. Greece	GRC	Chamber	awaiting referral request	length of civil proceedings	30/10/2012
60642/08	ALISIC and others v. Bosnia and Herzegovina, Croatia, "the former Yugoslav Republic of Macedonia", Serbia and Slovenia	BIH	Chamber	awaiting referral request	foreign currency savings	06/10/2012

SECTION 1.
NEW AGE OF MODERN LEGAL METHODOLOGY IN EUROPEAN JURISPRUDENCE

HARUTYUNYAN A. A.

European Court of Human Rights,
Judge in respect of Armenia

NEW DIMENSION OF THE CASE-LAW WITHIN THE ARTICLE 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: FREEDOM OF EXPRESSION (DELFI AS V. ESTONIA)

Key words: *European Convention, case-law, human rights.*

Some aspects of the theory. Article 10 guarantees freedom of expression [1; 2; 3], one of the cardinal rights guaranteed under the Convention. The marked importance attached to this right is readily explicable by its close linkage to democracy's political process and its role as an indispensable vehicle for minorities, political opponents, and civil society to foster public debates. Such a constitutional underpinning of freedom of expression lends succour to the consistent assertion of the Court that interference with this right can be justified only by "imperative necessities", and that exceptions to this right must be interpreted narrowly [4; 5; 6, p. 592].

Positive obligations. The Court has departed from its earlier approach of refraining from formulating a general theory on positive obligations and on the extent to which the Convention can be applied to relations between private persons [7]. It has gradually moved to the stance not dissimilar to that adopted in the context of Article 8. Nowadays, its consistent approach is to recognize that states must ensure that private individuals can effectively exercise their right of speech and communication among themselves [8; 9; 10; 11; 12]. There is full recognition that Article 10 rights apply equally to the relations between employers and employees that are governed by private law [6, p. 596; 8; 13].

Incitement to violence. When confronted with remarks liable to incite to violence against an individual, a public official, or the population, the Court's methodology is, as in cases of other hate speech, to recognize the generous protection of the expression rights under the first paragraph and to analyse the encroachments under the second paragraph. However, the Court has repeatedly stated "where … remarks constitute an incitement to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression" [14; 15].

Even if the impugned words fail to reach the threshold of incitement to violence, they may be curtailed to prevent serious public disturbance and inter-ethnic hatred in a violate region [16; 17]. However, that the interferences with free speech must be subject to the Court's rigorous review can be borne out in some distinct ways. First, the Court has ascertained specific elements such as the position of the applicant, the tone, form, addressees of the contested statement [17; 18; 19], and its impact on the public [20]. Still, when publishing or broadcasting an interview with representatives of organizations that espouse violence, media professionals must assume the 'duties and responsibilities' not to disseminate hate speech or glorification of violence [6, p. 605-607; 14; 21; 22; 23; 24; 25, p. 429-432].

DELFI AS v. ESTONIA

The applicant company alleged that its freedom of expression had been violated, in breach of Article 10 of the Convention, by the fact that it had been held liable for the third-party comments posted on its Internet news portal.

The applicant company is the owner of Delfi, an Internet news portal that published up to 330 news articles a day at the time of the lodging of the application. Delfi is one of the largest news portals on the Internet in Estonia.

There was a system of notice-and-take-down in place: any reader could mark a comment as leim (Estonian for an insulting or mocking message or a message inciting hatred on the Internet) and the comment was removed expeditiously. Furthermore, comments that included certain stems of obscene words were automatically deleted. In addition, a victim of a defamatory comment could directly notify the applicant company, in which case the comment was removed immediately.

The applicant company had made efforts to advise users that the comments did not reflect its own opinion and that the authors of comments were responsible for their content.

On 24 January 2006 the applicant company published an article on the Delfi portal under the heading "SLK Destroyed Planned Ice Road". Ice roads are public roads over the frozen sea which are open between the Estonian mainland and some islands in winter. SLK provides a public ferry transport service between the mainland and certain islands. At the material time, L. was a member of the supervisory board of SLK and the company's sole or majority shareholder.

On 24 and 25 January 2006 the article attracted 185 comments. About twenty of them contained personal threats and offensive language directed at L.

On 9 March 2006 L.'s lawyers requested the applicant company to remove the offensive comments and claimed 500,000 Estonian kroons (EEK) (approximately 32,000 euros (EUR)) in compensation for nonpecuniary damage.

On the same day the offensive comments were removed by the applicant company. On 23 March 2006 the applicant company responded to the request from L.'s lawyers. It informed L. that the comments had been removed under the notice-and-take-down obligation, and refused the claim for damages.

The court concluded that freedom of expression did not extend to protection of the comments concerned and that L.'s personality rights had been violated. L. was awarded EEK 5,000 (EUR 320) in compensation for non-pecuniary damage.

The Supreme Court upheld this judgement while partly modifying the reasoning.

Merits. ***Alleged violation of Article 10 of the Convention***

The Court considered that the case concerns the "duties and responsibilities" of Internet news portals, under Article 10 § 2 of the Convention, when they provide for economic purposes a platform for user-generated comments on previously published content and some users – whether identified or anonymous – engage in clearly unlawful speech, which infringes the personality rights of others and amounts to hate speech and incitement to violence against them. The Court emphasized that the present case relates to a large professionally managed Internet news portal run on a commercial basis which published news articles of its own and invited its readers to comment on them.

The Court noted that the applicant company's news portal was one of the biggest Internet media publications in the country; it had a wide readership and there was a known public concern regarding the controversial nature of the comments it attracted.

Moreover, the impugned comments in the present case, as assessed by the Supreme Court, mainly constituted hate speech and speech that directly advocated acts of violence. Thus, the establishment of their unlawful nature did not require any linguistic or legal analysis since the remarks were on their face manifestly unlawful.

The applicant company complained that holding it liable for the comments posted by the readers of its Internet news portal infringed its freedom of expression as provided for in Article 10 of the Convention.

Such an interference with the applicant company's right to freedom of expression must be "prescribed by law", have one or more legitimate aims in the light of paragraph 2 of Article 10, and be "necessary in a democratic society".

Lawfulness. The Court considers that its task is confined to determining whether the methods adopted and the effects they entail are in conformity with the Convention. Thus, the Court confines itself to examining whether the Supreme Court's application of the general provisions of the Obligations Act to the applicant company's situation was foreseeable for the purposes of Article 10 § 2 of the Convention.

The Court is satisfied on the facts of this case that the provisions of the Constitution, the Civil Code (General Principles) Act and the Obligations Act, along with the relevant case-law, made it foreseeable that a media publisher running an Internet news portal for an economic purpose could, in principle, be held liable under domestic law for the uploading of clearly unlawful comments, of the type in issue in the present case, on its news portal.

The Court accordingly finds that, as a professional publisher, the applicant company should have been familiar with the legislation and case law, and could also have sought legal advice. The Court observes in this context that the Delfi news portal is one of the largest in Estonia. Public concern had already been expressed before the publication of the comments in the present case and the Minister of Justice had noted that victims of insults could bring a suit against Delfi and claim damages. Thus, the Court considers that the applicant company was in a position to assess the risks related to its activities and that it must have been able to foresee, to a reasonable degree, the consequences which these could entail. It therefore concludes that the interference in issue was "prescribed by law" within the meaning of the second paragraph of Article 10 of the Convention.

Legitimate aim. The parties before the Grand Chamber did not dispute that the restriction of the applicant company's freedom of expression had pursued the legitimate aim of protecting the reputation and rights of others. The Court sees no reason to hold otherwise.

Necessary in a democratic society. The Court has previously held that in the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general. At the same time, the risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press.

Elements in the assessment of proportionality. The Court observes that, in order to resolve the question whether the domestic courts' decisions holding the applicant company liable for the comments posted by third parties were in breach of its freedom of expression, the Chamber identified the following aspects as relevant for its analysis:

1) the context of the comments,
2) the measures applied by the applicant company in order to prevent or remove defamatory comments,
3) the liability of the actual authors of the comments as an alternative to the applicant company's liability,
4) the consequences of the domestic proceedings for the applicant company.

1. The context of the comments

As regards the context of the comments, the Court accepts that the Supreme Court concluded that the applicant company had an economic interest in the posting of comments. In the view of the Supreme Court, the fact that the applicant company was not the author of the comments did not mean that it had no control over the comments section.

In sum, the Court considers that it was sufficiently established by the Supreme Court that the applicant company's involvement in making public the comments on its news articles on the Delfi news portal went beyond that of a passive, purely technical service provider. The Court therefore finds that the Supreme Court based its reasoning on this issue on grounds that were relevant for the purposes of Article 10 of the Convention.

2. Liability of the authors of the comments

In connection with the question whether the liability of the actual authors of the comments could serve as a sensible alternative to the liability of the Internet news portal in a case like the present one, the Court is mindful of the interest of Internet users in not disclosing their identity. Anonymity has long been a means of avoiding reprisals or unwanted attention. As such, it is capable of promoting the free flow of ideas and information in an important manner, including, notably, on the Internet. At the same time, the Court does not lose sight of the ease, scope and speed of the dissemination of information on the Internet, and the persistence of the information once disclosed, which may considerably aggravate the effects of unlawful speech on the Internet compared to traditional media.

According to the Supreme Court's judgment in the present case, the injured person had the choice of bringing a claim against the applicant company or the authors of the comments. The Court considers that the uncertain effectiveness of measures allowing the identity of the authors of the comments to be established, coupled with the lack of instruments put in place by the applicant company for the same purpose with a view to making it possible for a victim of hate speech to bring a claim effectively against the authors of the comments, are factors that support a finding that the Supreme Court based its judgment on relevant and sufficient grounds. The Court also refers, in this context, to the judgment in *Krone Verlag GmbH & Co. KG v. Austria (no. 4)* (no. 72331/01, § 32, 9 November 2006) in which it found that shifting the risk of the defamed person obtaining redress in defamation proceedings to the media company, which was usually in a better financial position than the defamer, was not as such a disproportionate interference with the media company's right to freedom of expression.

3. Measures taken by the applicant company

The Court considers that, when assessing the grounds upon which the Supreme Court relied in its judgment entailing an interference with the applicant company's Convention rights, there is nothing to suggest that the national court intended to restrict its rights to a greater extent than that required to achieve the aim pursued. On this basis, and having regard to the freedom to impart information as enshrined in Article 10, the Court will thus proceed on the assumption that the Supreme Court's judgment must be understood to mean that had the applicant company removed the comments without delay after publication, this would have sufficed for it to escape liability under domestic law.

Consequently, and taking account of the above findings to the effect that the applicant company must be considered to have exercised a substantial degree of control over the comments published on its portal, the Court does not consider that the imposition on the applicant company of an obligation to remove from its website, without delay after publication, comments that amounted to hate speech and incitements to violence, and were thus clearly unlawful on their face, amounted, in principle, to a disproportionate interference with its freedom of expression.

The portal had an automatic system of deletion of comments based on stems of certain vulgar words and it had a notice-and-take-down system in place, whereby anyone could notify it of an inappropriate comment by simply clicking on a button designated for that purpose to bring it to the attention of the portal administrators. In addition, on some occasions the administrators removed inappropriate comments on their own initiative.

Thus, the Court notes that the applicant company cannot be said to have wholly neglected its duty to avoid causing harm to third parties. Nevertheless, and more importantly, the automatic word-based filter used by the applicant company failed to filter out odious hate speech and speech inciting violence posted by readers and thus limited its ability to expeditiously remove the offending comments. The Court reiterates that the majority of the words and expressions in question did not include sophisticated metaphors or contain hidden meanings or subtle threats. They were manifest expressions of hatred and blatant threats to the physical integrity of L. Thus, even if the automatic word-based filter may have been useful in some instances, the facts of the present case demonstrate that it was insufficient for detecting comments whose content did not constitute protected speech under Article 10 of the Convention. The Court notes that as a consequence of this failure of the filtering mechanism these clearly unlawful comments remained online for six weeks.

Having regard to the fact that there are ample opportunities for anyone to make his or her voice heard on the Internet, the Court considers that a large news portal's obligation to take effective measures to limit the dissemination of hate speech and speech inciting violence – the issue in the present case – can by no means be equated to "private censorship".

Moreover, depending on the circumstances, there may be no identifiable individual victim, for example in some cases of hate speech directed against a group of persons or speech directly inciting violence of the type manifested in several of the comments in the present case. In cases where an individual victim exists, he or she may be prevented from notifying an Internet service provider of the alleged violation of his or her rights. The Court attaches weight to the consideration that the ability of a potential victim of hate speech to continuously monitor the Internet is more limited than the ability of a large commercial Internet news portal to prevent or rapidly remove such comments.

Lastly, the Court observes that the applicant company has argued that the Court should have due regard to the notice-and-take-down system that it had introduced. If accompanied by effective procedures allowing for rapid response, this system can in the Court's view function in many cases as an appropriate tool for balancing the rights and interests of all those involved. However, in cases such as the present one, where third-party user comments are in the form of hate speech and direct threats to the physical integrity of individuals, as understood in the Court's case-law, the Court considers, as stated above, that the rights and interests of others and of society as a whole may entitle Contracting States to impose liability on Internet news portals, without contravening Article 10 of the Convention, if they fail to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties.

4. Consequences for the applicant company

Finally, turning to the question of consequences of the domestic proceedings for the applicant company, the Court notes that it was obliged to pay the injured person the equivalent of EUR 320 in compensation for non-pecuniary damage. It agrees with the finding of the Chamber that this sum can by no means be considered disproportionate to the breach established by the domestic courts.

The Court also observes that it does not appear that the applicant company had to change its business model as a result of the domestic proceedings. According to the information available, the Delfi news portal has continued to be one of Estonia's largest Internet publications and by far the most popular for posting comments, the number of which has continued to increase. Anonymous comments – now existing alongside the possibility of posting registered comments, which are displayed to readers first – are still predominant and the applicant company has set up a team of moderators carrying out follow-up moderation of comments posted on the portal. In these circumstances, the Court cannot conclude that the interference with the applicant company's freedom of expression was disproportionate on that account either.

Conclusion. The Court finds that the domestic courts' imposition of liability on the applicant company was based on relevant and sufficient grounds, having regard to the margin of appreciation afforded to the respondent State. Therefore, the measure did not constitute a disproportionate restriction on the applicant company's right to freedom of expression.

Accordingly, there has been no violation of Article 10 of the Convention [26].

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HÜSEYNOV L.

European Court of Human Rights,
Judge in respect of Azerbaijan

THE ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE EXECUTION OF ITS JUDGMENTS: NEW APPROACHES

Key words: *European Court of Human Rights, judgment of the Court, execution of judgments, indication of specific measures.*

Under Article 46(1) of the European Convention on Human Rights, “the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties”. In other words, a State that has violated the Convention must fully and timely execute the judgment of the Court. As established under general international law, a judgment of the Court finding a violation of the Convention imposes on the respondent State three types of obligations: 1) to take steps to put an end to the violation, 2) to make reparation to the victim for the violation in order to restore, as far as possible, the situation before the breach (restitutio in integrum), 3) to adopt general measures to prevent future similar violations (guarantees of non-repetition). Thus, the obligation of the respondent State to execute a Court’s judgment goes well beyond the mere payment of the sums awarded by way of just satisfaction.

The Convention provides that it is the Committee of Ministers of the Council of Europe which shall supervise the execution of the Court's judgments (Article 46(2)). The interpretation of this provision during the first almost 40 years of existence of the Court was that the Committee of Ministers had an exclusive competence in the field of execution. The Court's traditional approach was that "it is not the Court's function to indicate, let alone dictate, which measures should be taken" by the respondent State (Airey v. Ireland (1979)). Requests for reparations other than monetary relief were consistently rejected by the Court. The Court's answer was that the State parties, although bound by the Court's judgments, were free to choose the means of implementing them in their own legal orders. The Court's focus as regards remedies was to order the payment of financial compensation to successful applicants.

This approach changed in the mid1990s. A new practice started in 1995 with the case of Papamichalopoulos v. Greece. It was the first judgment in which the Court gave a broader interpretation of the term "just satisfaction" under Article 41 of the Convention and indicated a measure other than just financial compensation. The case concerned land expropriation in Greece contrary to Article 1 of Protocol 1. In its judgment on just satisfaction the Court held that when it found a breach of the Convention the respondent State was under a legal obligation to "put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach". It added that, in spite of State Parties' "freedom to choose how to implement judgments, "if the nature of the breach allows of restitutio in integrum, it is for the respondent State to effect it, the Court having neither the power nor the practical possibility of doing so itself".

This approach was later upheld in Brumarescu v. Romania (2001), also dealing with restitution of property.

Another category of cases in which the Court started displaying the above-mentioned new approach was related to Articles 5 and 6 of the Convention in which it indicated, as a specific measure, the re-opening of trial proceedings (Gencel v. Turkey (2003), Somogyi v. Italy (2004); Stoichkov v. Bulgaria (2005), Ocalan v. Turkey (2005)). Initially, the Court merely identified or recommended the re-opening as the most adequate form of restitution, later it also ordered such measures in the operative provisions of its judgments (starting from the case of Lungoci v. Romania (2006)).

In 2004 the Court made a significant step forward in its new approach. The was the case of Assanidze v. Georgia, in which the applicant continued to be imprisoned despite having received a presidential pardon in 1999 and having been acquitted by the Supreme Court of Georgia in 2001. The Grand Chamber held that "by its very nature, the violation found in the instant case does not leave any real choice as to the measures required to remedy it" and that the state thus had to "secure the applicant's release at the earliest possible date". One judge said in his concurring opinion in Assanidze, it would have been illogical and even immoral, to leave Georgia with a choice of means, when the sole method of bringing the arbitrary detention to an end was to release the applicant (the continued detention, without any legal basis, of a person acquitted in a final judgment nearly three years ago, constituted a flagrant denial of justice). Georgia released Mr Assanidze five days after the Court delivered the judgment.

The Court came to a similar conclusion in Ilascu and others v. Moldova and Russia (2004). The Grand Chamber found a violation of Article 5 and held that "none of the applicants was convicted by "a court", and that a sentence of imprisonment passed by a judicial body such as the Supreme Court of the Moldova Republic of Transnistria could not be regarded as "lawful detention" ordered "in accordance with a procedure prescribed by law". The Court noted that the prolonged detention of the applicants would necessarily entail a serious prolongation of the violation of Article 5 found by the Court and a breach of the respondent States' obligation under Article 46(1) of the Convention to abide by the Court's judgment. It went on to order to the respondent States to "take all necessary measures to put an end to the arbitrary detention of the applicants still imprisoned and to secure their immediate release".

There was another important reason for the Court to get more actively involved in the execution process. With new States joining the Convention, the number of complaints lodged with the Court increased enormously. A considerable part of these complaints related to repetitive cases, i.e. complaints concerning the same problem. The Court could not examine every single of these cases without requesting the respective State to bring about necessary structural changes. To address that situation, the Committee of Ministers adopted a resolution in 2004 in which it invited the Court "as far as possible, to identify, in its judgments finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments".

The Court's "reply" came just a month later. That was the case of Broniowski v. Poland, a so-called pilot case. Pilot cases address structural or specific problems that may give rise, or are giving rise, to numerous and identical breaches of the Convention by the same State.

Broniowski concerned the property rights of a large group of Poles who had lost their land due to border changes after the Second World War. The Court held that Article 1 of Protocol 1 had been violated and that was due to a systemic defect in the Polish legal order. In its judgment the Court indicated that Poland had to "remove any hindrance to the implementation of the right of the numerous persons affected by the situation… or to provide equivalent redress in lieu". It was the first case in which the Court gave specific indications to remedy a systemic problem.

In 2011 a new rule (Rule 61) was added to the Rules of Court which codified the pilot judgment procedure. So far the Court has issued 29 pilot judgments. The last one was Rezmiveș and others v. Romania (2017) which was related to a structural dysfunction specific to the Romanian prison system.

The Court has also dealt with systemic or structural problems in the State Parties without formally resorting to the pilot judgment procedure. These are so-called quasi-pilot cases. The distinction between pilot and quasi-pilot judgments is not always clear. But it seems that the main difference is of a procedural nature. When dealing with pilot cases, the Court must invite the parties to comment upon the application of the pilot judgment procedure according to Rule 61(2) of the Rules of the Court. Furthermore, in quasi-pilot cases the Court usually does not prescribe general measures in the operative part.

Petukhov v. Ukraine (No. 2) can be given as one the most recent examples to quasi-pilot cases (March 2019). In this case the Court found a violation of Article 3 of the Convention on account of the irreducibility of the applicant's life sentence. The Court emphasised that this violation affected many people: there were already over sixty similar applications pending before the Court and many others might follow. The Court added that the present case, in so far as it concerns the irreducibility of a life sentence, discloses a systemic problem calling for the implementation of measures of a general character. The nature of the violation found under Article 3 of the Convention suggests that for the proper execution of the present judgment the respondent State would be required to put in place a reform of the system of review of whole-life sentences. The mechanism of such a review should guarantee the examination in every particular case of whether continued detention is justified on legitimate penological grounds and should enable whole-life prisoners to foresee, with some degree of precision, what they must do to be considered for release and under what conditions, in accordance with the standards developed in the Court's case-law.

Another Ukrainian quasi-pilot case is Ignatov v. Ukraine (2017). In that case the Court found a violation of Article 5 of the Convention, which was recurrent in the case-law concerning Ukraine. In this regard, one should mention the 2011 Kharchenko judgment, in which the Court had found similar violations of Article 5 § 1 (c), 3 and 4 of the Convention. The Court held in Ignatov that the issues stemmed from legislative lacunae and the respondent State was invited to take urgent action to bring its legislation and administrative practice into line with the Convention.

In this context, I would like to mention also the judgment in the case of Tomov and others v. Russia which was delivered in April 2019. The Court held that the problem of inhuman and degrading conditions of prisoner transportation in Russia was a recurrent structural problem. The Court had found a similar violation in more than fifty cases. Currently, more than 680 prima facie meritorious applications against Russia are now pending before the Court which feature, as their primary or secondary grievance, a complaint of inadequate conditions of transport. Of those, 540 applications were lodged in 2018. The Court recommended a wide range of general measures to tackle the said structural problem, in particular, reducing allocation to remote detention facilities, review of the normative framework and adaptation of vehicles, and ordered in the operative part of the judgment to make available, within eighteen months, a combination of effective domestic remedies in respect of complaints about conditions of transport that have both preventive and compensatory effects.

Although the Court's practice regarding the indication of specific remedial measures is not always consistent and coherent, one could nevertheless single out the following criteria for the Court getting thus involved in the execution process: a) the measure ordered is the only step to be taken to remedy the violation (it is when the nature of the violation found is such as to leave no real choice as to the measures required to remedy it); b) the urgency of putting an end to the violation; c) the gravity of the violation found; d) the occurrence of a continuing violation; and e) the existence of a systemic or structural problem. The first four criteria are related to the indication of individual measures, and the last one is applicable to situations in which the Court deems necessary to recommend or order general measures.

As regards the nature and variety of specific measures indicated by the Court, here are some examples:

Individual measures:

a) release of a person unlawfully detained (Assanidze (2004), Ilascu and others (2004), Yakisan v. Turkey (2007), Aleksanyan v. Russia (2008), Tehrani and others v. Turkey (2010), Fatullayev (2010), Del Rio Prada v. Spain (2013), S.K. v. Russia (2017), Şahin Alpay v. Turkey (2018), Selahattin Demirtaş v. Turkey (No. 2) (2018));

b) restitution in property cases (Papamichalopoulos v. Greece (1995), Brumarescu v. Romania (2001), Karanovic v. BiH (2007 – to transfer the applicant to the pension fund);

c) maintaining effective family contact (Gluhakovic v. Croatia (2011) – in the operative part: the authorities should ensure effective contact of the applicant with his daughter at a time compatible with his work schedule and on suitable premises)

d) reinstatement to former position (Oleksandr Volkov (2013); in Aliyev v. Azerbaijan (2018) the Court was less straightforward: it said that it should be left to the Committee of Ministers to supervise the adoption of measures aimed, among others, at restoring his professional activities);

e) disclosure of information (Youth Initiative for Human Rights v. Serbia (2013) - in the operative part: the State should ensure that the Serbian intelligence agency provide information to the applicant NGO about the number of people who had been the subject of electronic surveillance within three months).

f) obtaining diplomatic assurances (M.A. v. France (2018)):

g) bringing to a close the pending criminal investigation (Abu Zubaydah v. Lithuania (2018), Al-Nashiri v. Romania (2018))

As regards general measures indicated by the Court, they are mainly related to amending or repealing the relevant legislation (Vyerentsov v. Ukraine (2013), Berkovich and others (2018 – a ban on the private travel of persons who have had access to State secrets); Navalnyy v. Russia (2018), Zelenchuk and Tsytsyura v. Ukraine (2018 – "The Court stresses that the problem underlying the violation of Article 1 of Protocol No. 1 concerns the legislative situation itself. The Court considers that the respondent State should take appropriate legislative and/or other general measures to ensure a fair balance between the interests of agricultural land owners on the one hand, and the general interests of the community". Under Article 41: "The Court considers that the finding of a violation constitutes in itself sufficient just satisfaction for any non pecuniary damage sustained by the applicants. However, should the respondent State unreasonably delay adoption of the requisite general execution measures, this may, with the passage of time, lead to a situation where awards under Article 41 may eventually become warranted, at least for some categories of agricultural land owners".

The way how the Court indicates specific measures is different. The Court may simply give recommendations (which appear in obiter dictum) or make concrete orders by inserting them in the operative part. Many judges and academicians are of the opinion that indications that are not included in the operative part of judgments do not impose legal obligations upon States. In my view, this question is not a straightforward one. Let us take one example. If the Court finds that the domestic legislation is not compatible with the Convention, whatever formulation it uses to bring the respondent State's attention to that problem, or even if the Court says nothing about remedial action, it is clear that that legislation can no longer be applied.

Talking about the active involvement of the Court in the execution process – some authors call this as "judicialisation of the implementation" – one should also mention situations when the Court intervenes in the post-judgment phase.

According to the well-established case-law, Article 46(2) precludes the Court from verifying whether a State has complied with the obligations deriving from a Court's judgment. Complaints brought under Article 46 and alleging a State's failure to execute a judgment are declared inadmissible ratione materiae. Thus, the Court said in Bochan v. Ukraine (No. 2) that "the question of compliance by the High Contracting Parties with the Court's judgments falls outside its jurisdiction if it is not raised in the context of the "infringement procedure" provided for in Article 46(4)(5) of the Convention".

But it does not mean that measures taken by a respondent State for executing a judgment fall outside the jurisdiction of the Court. There are situations when the Court may intervene in the post-judgment phase.

First – The Court may accept follow-up applications which raise relevant new information not heard by the Court in its first judgment. In this regard, we can mention Bochan (No. 2) case. Relying on the Court's first judgment of 2007, the applicant asked the Supreme Court of Ukraine to reconsider her case. But her appeal was dismissed. She came back to Strasbourg complaining that the reasoning of the Supreme Court contradicted with the 2007 judgment. The European Court of Human Rights considered that this particular complaint is not about the outcome as such or the effectiveness of the national courts' implementation of the Court's earlier judgment but rather about the manner in which the decision had been reached in the domestic proceedings. This sufficed for the Court to find that the applicant's application raised a "new issue" under Article 6(1) of the Convention which it is competent to examine.

Second – The Court may intervene in the context of examining whether friendly settlements reached after the adoption of a pilot judgment were based on the respect for human rights required by Article 37(1). In Hutten-Czapska v. Poland (friendly settlement), the Court approved a settlement “having regard to both the general measures for addressing the systemic problem that had been identified and the individual measures afforded to the applicant under the agreement.

Third – the re-opening of clone cases, which had been frozen pending the adoption of a pilot judgment, offers a similar means by which the Court can review and respond to the non-adoption of implementing measures indicated in a pilot judgment. Rule 61(8) of the Rules of Court reads: “Subject to any decision to the contrary, in the event of the failure of the Contracting Party concerned to comply with the operative provisions of a pilot judgment, the Court shall resume its examination of the applications which have been adjourned in accordance with paragraph 6 above”.

Fourth – another way of intervention of the Court in the post-judgment phase is provided for in Article 46(4). This is so-called infringement proceedings.

It should be borne in mind that the power of the Court to indicate execution measures is not unlimited. This competence of the Court is complementary to the powers of the Committee of Ministers in the field of execution. It is necessary to maintain the institutional balance provided for in the Convention.

Finally, I would like to briefly touch upon the question of so-called “negative” indications of the Court. In some cases the Court, having found a violation, in particular, of Article 8 of the Convention, nevertheless specifically stated that the finding a violation should not lead the respondent State to perform relevant action in the execution process. For example, in R.S. v. Poland (2015), having held that the respondent State had failed to secure to the applicant the right to respect for his family life, noted the following: “as the children will soon reach the age of majority, there is no basis for the present judgment to be interpreted as obliging the respondent State to take steps ordering their return to Switzerland”. In another case (K.J. v. Poland (2016)), the Court found a violation of Article 8 and observed that “as the child has lived with her mother in Poland for over three years and a half, there is no basis for the present judgment to be interpreted as obliging the respondent State to take steps ordering the child’s return to the United Kingdom”. A similar observation was made by the Court in the case of Adzic v. Croatia (2 May 2019).

By way of conclusion, I would like to emphasise that the increased role of the Court in the execution of its judgments has proved to be effective. Indication of specific measures should be an integral component of the Court’s remedial strategy. The Court should specify measures tailored to the applicant’s situation in order to bring about restitutio in integrum whenever possible and appropriate. Providing specific remedies is a means for helping the respondent State fulfil its obligations to abide by a judgment and facilitate the monitoring task of the Committee of Ministers.

LOGVINSKI G. V.

Verkhovna Rada of Ukraine,
People's deputy of Ukraine

LIMITED CRIMINAL JURISDICTION IN INTERNATIONAL PRACTICE

Key words: *criminal policy, liability, International Criminal Court, fundamental rights.*

Considering the types of discretional powers of Ukraine within the application of the concept of legal space [1], it should be noted that the principles and components of modern criminal policy, especially the implementation of criminal law in different characteristics of the territorial definition of the sovereign rights of the state jurisdictions, change in the conditions of determining the domination of legal or non-legal regimes in the respective territories.

Legal space is determined primarily in the framework of the communicative activities of individuals. Reflecting the behavior of people in the context of the term, it is the interpretation of the relative assessment of the norm and deviations from them in a particular spatial continuum. The term «legal space» covers a whole range of interactions in society, controlled by law. The term is delimited by different spheres and local subject borders [2].

That gives us possibility to consider that in some circumstances the limits of criminal jurisdiction should be changed fully or partially. The territory with limited jurisdiction of the state is an integral part of the national legal area where the powers to exercise sovereignty are limited in accordance with international legal treaties (the UN Convention on the Law of the Sea, UN Convention on struggle with transnational organized crime, etc.), interstate conflicts, intrastate or hybrid conflicts, the development of abuses in information or deviations in other virtual space (illegal sea broadcasting, Darkweb deals, etc).

The mechanism of formation of the institute of criminal liability for crimes committed by persons in areas with limited jurisdiction in the criminal law of concrete state and international law is different both in essence and in the main models of application.

It is of great interest that International Criminal Court in its Appeals Chamber decision on Jordan Case stated that the existence of jurisdiction depends on its own source. Since customary international law is not known to confer jurisdiction on international courts, it means that the jurisdiction of an international court is prescribed in a written instrument. If that instrument is a treaty, then that treaty binds only those that are party to it. The Rome Statute is a treaty that binds the parties to it. But the written instrument that prescribes the jurisdiction of an international court can also be a Security Council resolution adopted under Chapter VII of the UN Charter, such as was the case of Al Bashir where the Court clarified that, in any event, Mr. Al-Bashir did not enjoy immunity as a Head of State vis-à-vis the ICC under customary international law, including in respect of an arrest by a State Party to the Rome Statute at the request of the ICC. The question then arises, if neither the Rome Statute nor the Security Council resolution expressly provides for immunity, where then must we look for that immunity? The natural place to look is in customary international law: hence, the need to discuss customary international, to see whether indeed it supports the idea of immunity from the jurisdiction of the ICC [3]. In Jaloud v. Netherlands [4] the ECHR considered that individuals injured by shots from the checkpoint at Iraque fell within the jurisdiction of the Netherlands envisioned by Security Council Resolution 1483 to control the checkpoint.

The impossibility of applying the norms of national law on the grounds of an international legal nature (the UN court decision on the distribution of jurisdictional powers, acts in high seas, in maritime economic zone, the enclaves, etc.) corresponds to additional obligations of state. Moreover, not all provisions of the existing national criminal law can be applied precisely for the conflict between national law and international obligations.

For example, the application of the law of innocent passage makes it possible to use the flag State's law when committing an offense on a ship passing by the territorial waters.

The limitation of the criminal punishment for crimes and abuse of power in areas with limited jurisdiction that arose in connection with the exit of part of the territory from the control of the government for external or internal reasons is considered in the conditions of the peculiarities of the state of development of the interstate conflict, the state of political and legal ideology in the state – victims of aggression, the degree of permission to enforce both the state and the consent of civil society to the use of coercion against its individual members.

The Ilaşcu and Others [5] case contained the concept of effective control under which Russia, was found to have offered political and military support to the separatist “Moldavian Republic of Transdniestria”, therefore the applicants came within the “jurisdiction” of the Russian Federation for the purposes of Article 1 of the Convention. There was a bunch of such a cases with last Stomatii v Respublic of Moldova and Russia [6] having the same arguments due to that military action, political, military support or local governing foreign territory whether that was done directly, through agressor’s armed forces, or through a subordinate local administration formats concept of effective control in determining the jurisdiction [7].

Thus the criminal policy on a territory with limited jurisdiction is considered a system of strategic and tactical measures that ensure the proper development, timely implementation and effective application of national criminal law, aimed at protecting against dangerous encroachments of social relations, which are carried out on the territory of sovereign rights of the state in limited features of the legal regime. We have confidence that the criminal law treatment of persons who committed crimes in a limited jurisdiction circumstances should be based on the principles of strict liability of officials and private sector employees, as well as the transparency of social control over abuse of power.

In resolving issues of jurisdictional powers of the state in criminal law should use the notion of the regime of criminal-legal space, which refers to the description of criminal legal relations in relation to the criminal law in the conditions of full or limited sovereignty of the state. The concept a «legal vacuum» or on a «zone of lack of Law» to which the provisions of the Convention do not apply de facto should be considered as null.

Unfortunately, nowadays, there are limited possibilities to ensure real protection of the basic fundamental rights of citizens by Ukraine (right to life, property) in the temporarily occupied territory, taking into account the realization of real jurisdictional powers by the aggressor state, and imposing responsibility for abuse of power by the state-aggressor and its organs.

This requires an additional analysis of the issues of the implementation of criminal policy in areas with limited jurisdiction and clarification of the prospects for the implementation of criminal policy in the areas of restored sovereignty.

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MYKHAILENKO D. H.

High Anti-Corruption Court,
Judge of the Appellate Chamber, Doctor of Law, Associate Professor

TEST FOR PROPORTIONALITY ON THE NORM ON THE ILLEGAL ENRICHMENT VIA THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Key words: *illegal enrichment, corruption crimes, human, offenses, Convention for the Protection of Human Rights and Fundamental Freedoms.*

The mechanism of criminal and legal counteraction to corruption crimes is currently on the verge of solving an important problem. The solution of this very problem will determine the further development of Ukraine's anti-corruption legislation – the permissibility and form of limiting human rights in order to effective corruption combatting in a state governed by the rule of law. As it was already noted in the legal literature, crisis of a liberal approach to the modern legal system could have a positive impact on a solution of this issue. The legal implementation of criminal liability for illegal enrichment and its effective application would be always linked with the need of restriction of certain human rights (the principle of presumption of innocence, the right not to testify against oneself, etc.). In this regard we need to establish clear legislative provision of the possibility and conditions of such a restriction. The establishment of the current version of Art. 20 of the UN Convention against Corruption (hereinafter «the Convention») rejected proposed ways to avoid or hide outlined interferences in fundamental human rights. At the same time, one should not shift the legal problems that arise during the implementation of Art. 20 of the Convention, from the debate about the balance of proof established by the burden of proof, and transfer it to the plane of direct violation of the presumption of innocence.

In the context of this problem, it should be noted that in 2006, the European Commission summarized the practice of the European Court of Human Rights (hereinafter «the Court») regarding the presumption of innocence and identified three situations in which the burden of proof does not lie entirely on the prosecution: (a) strict liability offenses (crimes of strict liability), (b) offenses where the burden of proof is reversed (crimes where the burden of proof under certain conditions is partially transferred to the accused), and (c) when a confiscation order is made (in cases of confiscation of property). In the first case, the prosecution must present evidence to prove that the accused committed the act (actus reus), but should not prove that he intended to act in such a way or to cause such a result (mens rea). In the second case, the prosecution has to prove that the accused acted in a certain way, when the accused has to prove that his actions were committed in the absence of guilt. The third case concerns cases of asset recovery at the expense of the accused or a third party, where the burden of proof can be transferred in the assumption that the assets are proceeds of crime that the owner of the assets must refute *(Green Paper – The Presumption of Innocence*

(COM(2006) 174 final). Commission of the European Communities, Brussels, 26.04.2006). All mentioned above cases when the burden of proof is transferred to the accused should be provided by domestic law. The aforesaid demonstrates that the limitation of the principle of presumption of innocence in situations when the burden of proof is transferred is permissible from the point of view of the European Union and the Convention for the Protection of Human Rights and Fundamental Freedoms of 04.11.1950.

At the same time, Ukrainian scientific studies regarding the criteria and limits of interference in the human rights have not yet been appropriately developed. All this shows the necessity of studying the peculiarities of the test for proportionality application in the field of the Criminal Law of Ukraine.

Nowadays this test is the most appropriate method to determine the extent of restriction of certain human rights in Europe. The technology of this test allows determining whether it is possible to interfere (limit) some right or legitimating interest by a certain measure in certain circumstances. The application of the test for proportionality" by the Court has created a specific practice. Its study and application allows providing such a test in Ukraine in order to establish rules on illegal enrichment in the model of Art. 20 of the Convention in the Criminal Code of Ukraine. Thus, while determining the legitimacy of the purpose of limiting the principle of presumption of innocence, one should proceed from the fact that the goals, which are first achieved when the norm about illegal enrichment is applied, is to expose and punish corruption, to reduce its level and to become closer to the implementation of the inevitability of criminal responsibility, that is to avoid the impunity of corruption in conditions of its widely dissemination. According to the Court's case law, «protection of public order» and «crime prevention», in case when certain measures restrict human rights, are objectives which are fully compatible with the Convention for the Protection of Human Rights and Fundamental Freedoms (*Beldjoudi v. France, № 12083/86, § 70, ECHR 1992*). It is clear that the purpose pursued by the limitation of the principle of presumption of innocence by introducing liability for illegal enrichment is legitimate.

When checking the norm about unlawful enrichment on the criterion of the test «need for action», it is important to demonstrate that the interference with the principle of presumption of innocence while establishing criminal liability for illegal enrichment is negligible. In this case it would show the low rate of human rights encroachment. Here, it is noteworthy that, in its own assessment of the evidence in the case, the Court is guided by the criterion of proof «in the absence of reasonable doubt». In the light of the requirements of paragraph 2 of Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms the Court accepts the existence of presumptions that bear the burden of proving the innocence on the accused, unless it is restricted by reasonable limits, which take into account specificities of the situation and observe the right to a fair trial. In such cases, attention is paid to whether the accused was able to effectively defend and refute the existence of incriminated facts that are believed to be [1, p. 22]. There is a large number of specific ways to legitimately increase the official's assets in the case of proving that assets growth had been reached in illegal (corrupt) way. In order to prove the discrepancy of his property status with the official incomes, prosecution has to verify and prove the absence of the whole set of possible legal ways of acquiring such property, which in fact is extremely complex, and often impossible. On the contrary, defense has an opportunity to indicate a concrete way of the accused property increasing in order to justify that such an increasing is lawful. That is, the prosecution should check a very large number of facts, and the defense can justify only one and this seems to be not so difficult tusk. This allows us to conclude that there is minor restriction of human rights (the principle of presumption of innocence) by the norm of illegal enrichment and the proper provision of the right to fair trial while its application, which, in turn, proves that the criterion of the test for the need for action is met.

In order to find a solution for our problem which is discussed in this article it is especially important to analyze the Court's practice on the test for proportionality stricto sensu. At this stage, the test does not require a comparison of the two incommensurable values [in the case being analyzed, it is the value of the principle of presumption of innocence, on the one hand, and national security or public order (ordre public) on the other]. Here, not the listed values are compared, but the depth of the violation of each of them in the case of application and in the case of non-application of rights restrictions. In case when restricted right causes the disproportionately greater violation of the presumption than the violation of national security upon its non-application, then such a restriction should be rejected, otherwise it should be recognized as permissible and necessary in a democratic society.

In the case under consideration, the purpose of limiting one of the elements of the principle of presumption of innocence is to counteract corruption (to avoid the impunity of corruption by a significant increase in efficiency in its disclosure and punishment, in order to reduce the level of this phenomenon under conditions of its excessive distribution).

Thus, in the case of approximately the same (as in the case of illegal enrichment), depth of the violation of the principle of presumption of innocence (by transferring the burden of proof in relation to particular circumstances to the accused), we could outline the following purpose of such legal requirements and the situation of their application: 1) avoidance of impunity in case of violation of traffic rules by establishing liability of its owner in a situation where it is impossible to identify a person who has driven a car (if the accused does not prove that his car was guided by another person against his will) *(Joost Falk against the Netherlands, № 66273/01, ECHR 2004)*; 2) avoiding the impunity of smuggling of prohibited goods by establishing responsibility for such a crime of a person possessing the relevant objects (if the accused can not prove the circumstances of force majeure) (*Salabiaku v. France, № 10519/83, ECHR 1988; Pham Hoang v. France, № 13191/87, ECHR 1992*); 3) preventing the commission of offenses by a company by requiring the head of a company to properly perform its duties to control its activities by establishing the liability of the director of such a company for any of its offenses (if the latter does not prove that the offense was committed without his knowledge and that he used all measures to prevent it) *(AG against Malta, No. 16641/90, ECHR 1991)*; 4) Avoiding the legalization of proceeds from drug trafficking and avoiding forfeiture of property for such actions by using seizure of assets acquired during the six years preceding the specified crime (if the accused can not prove the legality of the source of their origin) *(Grayson and Barnham v. United Kingdom, No. 19955/05 and No. 15085/06, ECHR 2008)*.

The Court did not recognize that the transfer of the burden of proof is contrary to paragraph 2 of Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms in all described situations. In the context of studying the legal problems of the instrument provided by Art. 20 of the Convention, the cases described and their judgment by the Court are valuable because in each of them the purpose pursued by the restriction of the presumption of innocence appears to be less important for the democratic functioning of Ukrainian society than the purpose of establishing responsibility for illicit enrichment.

So taking into account the Court's practice on the application of the test for proportionality, we are to conclude that limiting the principle of the presumption of innocence by shifting the burden of proof to assert legality of the increase in assets (the subject of a corruption offense) to the part of defense with previous proving a significant increase in the assets of the entity and inconsistency of such increase with the declared legal incomes during the establishment of criminal liability for illegal enrichment ting is proportionate in view of the purpose, which is achieved by the action of this measure. In this regard, the transfer of the burden of proof provided by the norm of illegal enrichment which is aimed to counteract corruption does not contradict Clause 2 of Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and is consistent with the requirements of Art. 62 of the Constitution of Ukraine and Art. 17 CPC of Ukraine.

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MAYDANYK R. A.

Taras Shevchenko National University of Kyiv,
Head of the Department of Civil Law of the Faculty of Law,
Doctor of Law, Dr. Habil, Academician

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 contries-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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BABIN B. V.

Law Firm «Barristers»,
Doctor of Law, Professor, Dr. Habil

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.*

Now practically nobody of Ukrainian lawyers working with the criminal law will not be surprised for usage the practice of the European Court of Human Rights (ECtHR) also as for applying to ECtHR on situations in the certain criminal proceedings. At the same time wide set of tools and possibilities for implementing the UN conventional mechanisms to the criminal proceeding did not got a wide development in Ukraine.

Now Ukraine is a full member of majority of the universal human rights treaties and relevant optional protocols that grant to individuals and groups right to apply statements (communications or applications) about violating their rights, guaranteed by the relevant convention, to the specially established bodies such as Human Rights Committee (CCPR), Committee against Torture (CAT), Committee on Enforced Disappearances (CED), Committee on the Elimination of Discrimination against Women (CEDAW), Committee on the Elimination of Racial Discrimination (CERD), Committee on the Rights of the Child (CRC), Committee on the Rights of Persons with Disabilities (CRPD). Only two UN bodies – Committee on Economic, Social and Cultural Rights (CESCR) and Committee on Migrant Workers (CMW) have no mandate to elaborate and research the communications against Ukraine.

Those committees are located in Geneva, their activities are under common auspice of the UN Office of the High Commissioner for Human Rights (OHCHR). As committees so their members, appointed regarding member States` proposals, act in compliance with the relevant convention (covenant), with own rules of procedure and, in certain volume, with own previous decisions (views) in individual cases and common statements for interpretation and explanation the conventional norms.

Sending individual communication to the relevant conventional committee must be done after exhausting by the victim the effective national legal remedies, available in a reasonable terms. The communications must be signed, grounded and supported by the written evidences, they may not be transferred to some international bodies in the same time; victim must not abuse his right on communication with the committee and pass such appeal in the limited term after national remedies exhausting (various committees established it in 6 months or in one year).

All committees use the literal proceeding and use one of three UN working languages (English predominantly), but passing the communications and attached documents` copied (or their translations) may be done on any of UN official languages, including Russian. First communication with committee in case must be done by the regular post but in started proceedings committees use actively the emails connecting them with victims. The approximate examples (drafts) of the communications and addresses of any UN conventional committee, all relevant to its work documents are available in the committee web-page on the UN web-site. Abovementioned simplifies the awareness and possibility for Ukrainian lawyers to use the conventional committees` mechanisms.

Alas, if the quantity of applications sent annually against Ukraine to the ECtHR are calculated in thousands – less than a hundred of communication are sent against Ukraine to all UN committees for the last two decades; it may be explained by some reasons. First, the Ukrainian legislation does not foresee the special character of usage the remedies, established in the decisions of the conventional bodies, that is not in compliance with the special order of execution the ECtHR decisions, prescribed by the Ukrainian Law on 23rd of February, 2006 № 3477-IV, governmental decrees on 31st of May, 2006 № 784 and on 7th of March 2007 № 408.

At the same time regarding the common international obligations of Ukraine, including the art. 26 of Vienna Convention on the Law of Treaties, 1969, any debts and obligations established by the decisions of the conventional committees are obligatory for relevant states in the framework of the conscientious execution of own treaty obligations. More, in compliance with the part 5 of art 55 of Ukrainian Constitution anybody have the right, after usage the national tools of legal remedies, to appeal on defense own rights and freedoms on only to the «relevant international courts» but to the «relevant bodies of the international organization where Ukraine is a member State or a participant State»; UN conventional committees are certainly such kind of bodies. More, act of the conventional committee, establishing the violation the human rights, guaranteed by the relevant covenant (convention), must be executed by Ukraine in the framework of compensation the damage done by acts, decisions and inactivity of the power bodies and their representatives (art. 56 of Ukrainian Constitution).

Secondary, Ukrainian legislation did not establish the special criminal procedural order of revision the court decisions after adopting the conventional committee act. As, regarding to the p. 2 of part 3 of art. 459 of the Criminal Procedural Code, if Ukraine only violation by Ukraine own international obligations, established by the international court body, solving this case, is the exclusive circumstances obliging the Great Chamber of the Supreme Court to review the case; conventional committees are not the international court bodies. But decisions of the ECtHR as of a body certainly covered by this Code`s provision, also not often cause the review the case by the Supreme Court, and such Great Chamber decisions are not always for the applicant`s merits. But other forms of usage the ECtHR decisions and conventional committees acts in the Ukrainian national criminal proceedings are very similar, especially in cases where the reasonable terms conditions are violated and national procedures are ingoing.

Such execution the committee decision may go by different ways: as a prove in proceeding, as material or ground for the application or cassation in usual way, as a ground for withdrawal to or initiating the disciplinary proceeding for judges or prosecutors acted in this case before the committee decision. If the terms for appellation or cassation the final court decision are exhausted the committee act may be used as a ground for the procedure reflected in p. 4 of part 2, art. 459 of the Criminal Procedural Code – as a new established circumstances. Regarding part 1 of art. 463 of the Criminal Procedural Code application on the review of relevant court decision must be given not to the Great Chamber of the Supreme Court but – via the court that violated by the decision, being in force, conventional human rights in this case, researched by the committee.

Usage the conventional committees is well-grounded as against the state that are not members of the Council of Europe (such as Belarus or Kazakhstan), or in cases where the volume of rights defended by the relevant UN treaty is much more wide, comparing with the Convention, 1950 and Protocols to it. Art. 10 of the International Covenant on Civil and Political Rights, guaranteeing the prisoners` rights, may be the easiest example of such situation. And more often the ECtHR refuses to research the individual application, or does not give any answer for passed application in a reasonable time, and the violations of the applicant`s rights by state are ongoing.

Other preference of the UN committees is in the modern extreme congestion of the ECtHR, elaborating more than 56 thousands of cases for the end of 2018. Such congestion cause the brutal simplifying by ECtHR the nature of cases, arbitrarily related by the Court`s Registry to group of certain «model cases» or «well –established cases», the adjournment of consideration of the principal and complicate cases for years and even decades. In this situation UN conventional committees are strongly tied by own Rules of Procedures in terms of considerations and communications on the individual communications and are able to execute such terms – as the number of cases in committees are extremely low. For example in 2018 UN Human Rights Committee got 189 individual communications and no one against Ukraine among them (comparing with 5 communications against Nederland, 9 against Spain and 15 against Russia). So this issue may be a fruitful ground not only for scientific researches but also for practical achievements.

ULIANOVA H. A.

National University «Odesa Law Academy»,
Vice-Rector for Scientific Work, Doctor of Law, Professor

FREEDOM OF CREATIVITY AND RESTRICTIONS THEREON IN THE EUROPEAN COURT OF HUMAN RIGHTS JUDGMENTS

Key words: *creativity, restrictions thereon, freedom of creativity, European Court, human rights.*

The right of citizens to freedom of literary, artistic, scientific and technical creativity, freedom of thought and speech, as well as free expression of their views and convictions is guaranteed by the Constitution of Ukraine.

The freedom of creativity allows a subject of law to act in accordance with their internal convictions, which may differ from the generally accepted requirements, including those, which have been legally established. However, where an individual seeks public, in particular, state appraisal of his/her activity, he/she must correlate his/her behavior with the generally accepted model of conduct [1, p. 17].

The freedom of creativity can be divided into several types taking into account the phased character of creative activity. The freedom to create a work involves the creator’s choice of the sphere of creative activity, the type of works, themes, involvement of co-authors in the creative process, creation of an object on their own initiative or by request, in order to meet their own needs or for dissemination in the society, etc.

The freedom of publication (promulgation) and the use of intellectual property results are more limited, which is due to the need to observe the interests of the state, society, and individuals whose rights may be infringed as a result of such actions. Given the above mentioned, the issue of the possibility and expediency of establishing restrictions in the sphere of creative activity acquires special topicality.

Restrictions on the freedom of creativity may have various character, origin and purpose, due to which fact it appears possible to divide them into three categories. Firstly, these are restrictions, which have been established by the creator; they are individual in nature and determined by the creator's outlook, sphere of creative activity, purpose of the creation, etc. Secondly, these are restrictions of creativity, which have a social character and have been formed by the society and/or state. Such restrictions are moral, ethical, and preventive in nature. Thirdly, these are legislative restrictions, which are binding either on all creators or they may have been established for particular types of intellectual and/or creative activity.

The rules of the Law "On the Protection of Public Morals", which enforces the compliance with the norms of public morals, the prohibition of propaganda of violence, war, etc., may be classified as general restrictions on the freedom of creativity.

Despite the fact that the introduction of restrictions on the distribution of certain products is aimed at protecting the rights and interests of the users of intellectual property objects, their implementation raises numerous disputes both in domestic and foreign case law. In fact, even if certain creative works comply with the general criteria of morality and possess social utility there always remains a subjective approach to their assessment, from the viewpoint of both the creator and the public. Under these conditions, disputes over the lawfulness of dissemination of particular works have been increasingly resolved in courts.

The European Court of Human Rights case law dealing with creativity limitation cases, which is aimed at protecting the interests of particular categories of individuals as well as the society and state as a whole deserves particular attention.

An analysis of the practice of considering individual cases concerning the lawfulness of restrictions on the freedom of creation, in particular the freedom to disseminate individual works among the general public, suggests that the Court takes into account, among other things, several basic criteria for resolving the matter, particularly the nature of the information, which raises the question of the lawfulness of its dissemination (artistic works, publications in mass media); content and themes of works; possibility of a negative impact of the works on the rights and interests of different categories of individuals (special attention being paid to the protection of the rights and interests of children) or possibility to affect religious feelings, etc.

Restrictions on creativity and dissemination of information are deemed legitimate where this dissemination of information adversely affects the interests of certain categories of society members, violates religious or moral principles.

Thus, in the case of Wingro ve v. the United Kingdom, the European Court of Human Rights did not find encroachment upon the principle of freedom of creativity in the fact of restriction on the controversial film display, since, in this case, the state's intervention pursued a legitimate aim (protection of the rights of others, especially the right to freedom of religion) and was necessary in a democratic society. The European Court reached a similar conclusion in another case, namely Otto-Preminger-Institut v. Austria. This case concerned a ban on the distribution of the film, which distorted the doctrine of the Roman Catholic Church. The court, in particular, stated that, in the context of religious beliefs and religion, the artist could legitimately be obliged to avoid, where possible, the expression of opinions that are unreasonably offensive to others and thus violate their rights [2].

Therefore, in determining the lawfulness of restrictions on the dissemination of particular works, the European Court of Human Rights proceeds from assessment of their possible negative impact on the interests of society and certain categories of citizens, violations of established norms of public morals, religion, etc.

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PODTSERKOVNYI O. P.

National University «Odesa Law Academy»,
Head of the Department of Economic Law and Procedure, Corresponding Member of the National Academy of Legal Sciences of Ukraine Sciences,
Doctor of Law, Professor, Arbitrator of the ICAC at the Ukrainian CCI

ON THE DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS, WHICH ARE MOST OFTEN USED IN THE PRACTICE OF ECONOMIC COURTS OF UKRAINE

Key words: *European Court of Human Rights, case-law, economic courts.*

1. Court enforcement action remains one of the most important problems in the field of economic activity in Ukraine. Therefore, in the practice of

economic courts, a number of decisions of the European Court of Human Rights concerning the enforcement of court decisions should be applied.

In particular, In the case of Rysovskyy v. Ukraine (appl 29979/04) in p. 67 ECHR h*eld*: As regards the first aspect, it is the Court's settled case-law that, as a general rule, failure of the State authorities to provide an applicant with a property awarded to him or her by a final court judgment constitutes an interference incompatible with the guarantees set out in the first sentence of the first paragraph of Article 1 of Protocol No. 1 (see, among other authorities, *Burdov v. Russia*, no. 59498/00, § 40, ECHR 2002-III; *Jasiūnienė v.Lithuania*, no. 41510/98, § 45, 6 March 2003; and *Voytenko v. Ukraine*, no. 18966/02, §§ 53-55, 29 June 2004). The Government have not provided any explanation which would justify the non-enforcement in the present case as "lawful" and warrant departure from the above principles.

As the same, in the Case of Voytenko v. Ukraine (Application no. 18966/02) ECHR held: 53. The Court recalls its case-law that the impossibility for an applicant to obtain the execution of a judgment in his or her favour constitutes an interference with the right to the peaceful enjoyment of possessions, as set out in the first sentence of the first paragraph of Article 1 of Protocol No. 1 (see, among other authorities, Burdov v. Russia, no. 59498/00, § 40, ECHR 2002-III; Jasiūnienė v. Lithuania, no. 41510/98, § 45, 6 March 2003). 54. In the instant case the Court is therefore of the opinion that the impossibility for the applicant to obtain execution of his judgement for a period of four years constituted an interference with his right to the peaceful enjoyment of his possessions, within the meaning of the first paragraph of Article 1 of Protocol No. 1. 55. By failing to comply with the judgment of the Donetsk Garrison Military Court, the national authorities prevented the applicant, for a considerable period of time, from receiving in full the money to which he was entitled. The Government have not advanced any justification for this interference, and the Court considers that a lack of budget funds cannot justify such an omission. Accordingly there has also been a violation of Article 1 of Protocol No. 1.

2. A major problem in economic disputes is the assessment of the actions of the state authorities in the field of management in terms of the principle of proportionality. The following ECHR decisions are important to address these issues.

In the case of Ukraine-Tyumen v. Ukraine *(Application no. 22603/02)* ECHR held: 55. The Court reiterates that an interference with the peaceful enjoyment of possessions must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see, among other authorities, *Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, Series A no. 52, p. 26, § 69). The concern to achieve this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole, including therefore the second sentence, which is to be read in the light of the general principle enunciated in the first sentence. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions (see *Pressos Compania Naviera S.A. and Others v. Belgium*, judgment of 20 November 1995, Series A no. 332, p. 23, § 38). 56. In determining whether this requirement is met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing how the measures are to be implements and to ascertaining whether the consequences of implementation are justified in the general interest for the purpose of achieving the object of the law in question. Nevertheless, the Court cannot fail to exercise its power of review and must determine whether the requisite balance was maintained in a manner consonant with the applicant's right to “the peaceful enjoyment of [its] possessions”, within the meaning of the first sentence of Article 1 of Protocol No. 1 (see *Zvolský and Zvolská v. the Czech Republic*, no. 46129/99, § 69, ECHR 2002-IX).

3. Many cases in the area of economic analysis based on public interest grounds as recognition of the transaction null and legal grounds for intervention in economic activity.

The decisions of the European Court of Human Rights should be taken into consideration here.

In particular, in the case of Intersplav v. Ukraine (Application no. 803/02) ECHR held: 38. The Court reiterates that States have a wide margin of appreciation in determining what is in the public interest as the national legislature has a wide discretion in implementing social and economic policies. However, that margin of appreciation is not unlimited and its exercise is subject to review by the Convention institutions (see Lithgow and Others v. the United Kingdom, judgment of 8 July 1986, Series A no. 102, p. 50-51, §§ 121-22).

4. In the procedural activity of economic courts, there is often need to interpretate the laws. In this case, the judicial authorities can not, without justification of the reasons, change the established legal position. This is an element of predictability of laws.

That's why the decisions of the European Court of Human Rights concerning the stability of the interpretation of the law must be taken into account.

In particular, in the case of Serkov v. Ukraine (Application no. 39766/05) ECHR held: 36. The Court admits that it is primarily for the national authorities to interpret and apply domestic law. However, the Court is required to verify whether the way in which the domestic law is interpreted and applied produces consequences that are consistent with the principles of the Convention, as interpreted in the light of the Court’s case-law (see Scordino v. Italy (no. 1) [GC], no. 36813/97, §§ 190 and 191, ECHR 2006-V). 39. The Court admits that there may indeed be cogent reasons why the guiding legal interpretations need to be revised. The Court itself, applying dynamic and evolutive approaches in interpreting the Convention, may depart, where necessary, from its previous interpretations, ensuring thereby the effectiveness and contemporariness of the Convention (see Vilho Eskelinen and Others v. Finland [GC], no. 63235/00, § 56, ECHR 2007-IV, and Scoppola v. Italy (no. 2) [GC], no. 10249/03, § 104, ECHR 2009-...). 40. However, the Court cannot discern any justification for the shift of legal interpretation the applicant faced. In fact no reasons were given by the Supreme Court to explain the reinterpretation in question. Such a lack of transparency must have affected public confidence and trust in the law. In the circumstances of the present case the Court considers that the manner in which the domestic courts interpreted the relevant legal provisions undermined their foreseeability. 41. The Court further notes that the possibility of such divergent interpretations of the same legal provisions was essentially generated by the inappropriate state of domestic law on this issue. The rules contained in the Presidential Decree and the VAT Act gave unjustified leeway in interpreting the ways in which they could be correlated, as well as in understanding the exact scope and meaning of their requirements. 42. Accordingly, in the Court's opinion, the lack of the required foreseeability and clarity of the domestic law on such an important fiscal issue, producing opposing judicial interpretations, upset the requirement of "quality of law" under the Convention.

5. The practice of the ECtHR concerning the reasonable time-frame for dealing with cases is less relevant in the activity of economic courts of Ukraine. After all, the economic courts of Ukraine ensure the highest compliance with the terms of consideration of cases in comparison with other courts of Ukraine and other countries.

At the same time, issues of lengthy procedures for appealing and reviewing cases under newly discovered circumstances may be taken into account as cases of violation of reasonable time for review of cases and violation of the right to fair court.

In particular, it could be taken into account the case of ECHR Zheltyakov v. Ukraine (Application no. *4994/04*), where ECHR held: 62. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the complexity of the case and the conduct of the applicant and the relevant authorities (see, for instance, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII). 64. The Court considers that although the case might have been somewhat complicated by the examination of several claims, all of them having been eventually joined, that fact alone cannot explain the overall length of the proceedings. Nor does the conduct of the applicant, who somewhat delayed the proceedings (see paragraphs 19 and 33 above), explain such length. Indeed, the Court notes that the major delays were caused by the lengthy consideration of the cases by the first-instance courts and by their repeated adjournments of the hearings (see paragraphs 9, 10, 19, 25, 26, 29, 30, 32 and 33 above). It concludes that the responsibility for the protracted length of the proceedings rests with the State.

In practical terms, the application of ECHR rulings in the practice of economic courts of Ukraine is important for the provision of judicial acts of greater authority and predictability in the light of the prospects for economic development.

BYLYTSIA I. O.

National University «Odesa Law Academy»,
Associate Professor at the Department of Judiciary,
Law Enforcement Authorities and Advocacy, PhD in Law

IMPACT OF DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS ON THE SELECTION OF PREVENTIVE MEASURES IN THE CONTEXT OF PRE-TRIAL INVESTIGATION

***Key words**: decisions, human rights, pre-trial investigation, preventive measure.*

In accordance with clause 5 of Article 9 of the Criminal Procedural Code of Ukraine, the criminal procedural law of Ukraine is applied taking into account the practice of the European Court of Human Rights. However, in most cases, domestic judges do not apply the privilege of the European Court of Human Rights or ignore it at all when deciding to choose a preventive measure within the framework of a criminal proceeding.

In accordance with paragraph 2 of Article 177 of the Criminal Procedural Code of Ukraine, the grounds for the application of a preventive measure are the existence of a reasonable suspicion of a person committing a criminal offense, and also the existence of risks which give sufficient grounds to the investigating judge, the court to consider that the suspect, the accused, the convict may carry out the actions provided for by part one this article.

The overwhelming majority of the decisions of the investigating court about the selection of a preventive measure justify the suspicion only of the gravity of the crime committed by the suspect and neglected the practice of the European Court of Human Rights. Since, as is apparent from the judgment of the European Court of Human Rights in the case of Nikolov v Bulgaria, the gravity of the crime itself, in the conduct of which the suspect is a person, can not be an unconditional ground for electing a preventive measure in the form of detention. In accordance with the decision of the European Court of Human Rights in the case Affaire Boicenco v Moldova §§ 143-145 In the present case, the Court notes that both the first-instance court and the Court of Appeal, when ordering the applicant's detention and the prolongation thereof, have cited the relevant law, without showing the reasons why they considered to be well-founded the allegations that the applicant could obstruct the proceedings, abscond or re-offend. Nor have they attempted to refute the arguments made by the applicant's defence. Thus, the circumstances of this case are similar to those in Becciev v. Moldova, §§ 61-62 and Sarban, §§100-101, cited above, in which this Court found violations of Article 5 § 3 of the Convention on account of insufficient reasons given by the courts for the applicants' detention. Since the Government presented no reasons for distinguishing this case from the above cases, the Court considers that the same approach should be adopted in the present case. In the light of the above, the Court considers that the reasons relied on by the Buiucani District Court and by the Chişinău Court of Appeal in their decisions concerning the applicant’s detention on remand and its prolongation were not “relevant and sufficient”. There has accordingly been a violation of Article 5 § 3 of the Convention in this respect. A similar decision was made in case of Bykov v. Russia §§ 65-67 turning to the instant case, the Court observes that the applicant spent one year, eight months and 15 days in detention before and during his trial. In this period the courts examined the applicant's application for release at least ten times, each time refusing it on the grounds of the gravity of the charges and the likelihood of his fleeing, obstructing the course of justice and exerting pressure on witnesses. However, the judicial decisions did not go any further than listing these grounds, omitting to substantiate them with relevant and sufficient reasons. The Court also notes that with the passing of time the courts' reasoning did not evolve to reflect the developing situation and to verify whether these grounds remained valid at the advanced stage of the proceedings. Moreover, from September 7, 2001 the decisions extending the applicant's detention no longer indicated any time-limits, thus implying that he would remain in detention until the end of the trial. As regards the Government's argument that the circumstances of the case and the applicant's personality were self-evident for the purpose of justifying his pre-trial detention, the Court does not consider that this in itself absolved the courts from the obligation to set out reasons for coming to this conclusion, in particular in the decisions taken at later stages. It reiterates that where circumstances that could have warranted a person's detention may have existed but were not mentioned in the domestic decisions it is not the Court's task to establish them and to take the place of the national authorities which ruled on the applicant's detention. The Court therefore finds that the authorities failed to adduce relevant and sufficient reasons to justify extending the applicant's detention pending trial to one year, eight months and 15 days. There has therefore been a violation of Article 5 § 3 of the Convention.

So the decision of the European Court of Human Rights was adopted in the case of Mamedova v. Russia § 80 The Court further observes that the decisions extending the applicant’s detention had no proper regard to her personal situation. In most decisions the domestic courts used the same summary formula and stereotyped wording. The District Court’s decisions of July 19 and August 2, 2005 gave no grounds whatsoever for the applicant’s continued detention. It only noted that «the applicant should remain in custody». It is even more striking that by that time the applicant had already spent a year in custody, the investigation had completed and the case had been referred for trial. There has therefore been a violation of Article 5 § 3 of the Convention.

Consequently, to date, active judges in the vast majority of cases are prosecuted and, in determining the validity of the suspicion of a crime, indicated in the petition of the investigator and agreed by the prosecutor. Perhaps this tendency will change when new judges will come to justice, who will gain this status in the order of a reformed system of selection for the judicial system.

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KOVALCHUK I. S.

National University «Odesa Law Academy»,
Associate Professor at the Department of Judiciary,
Law Enforcement Authorities and Advocacy, PhD in Law

WAYS OF USING THE LAWYERS OF THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS WHEN CHOOSING PREVENTIVE MEASURES

Key words: *preventive measures, European Court of Human Rights, criminal proceeding, offences, advocacy practice.*

In accordance with the current legislation, the purpose of a preventive measure in the criminal process is to ensure the execution of the suspect, the accused of the procedural duties entrusted to him. Part 1 of Article 177 of the Criminal Procedural Code of Ukraine defines a clear list of risks that may be committed by a suspect, accused, namely:

1) to abscond from the bodies of pre-trial investigation and / or court;
2) destroy, conceal or distort any of the things or documents that are essential for establishing the circumstances of the criminal offense;
3) illegally affect the victim, witness, other suspect, accused, expert, specialist in the same criminal proceeding;
4) impede criminal proceedings in another way;
5) commit another criminal offense or extend the criminal offense in which the suspect is accused. Each of these risks should be grounded on the prosecution side, which should pay attention to the lawyer.

When preparing a lawyer for a defense counsel for a trial, a lawyer should choose to apply for a preventive measure to the weight of the practice of the European Court of Human Rights.

Concerning the risk of hiding from pre-trial investigation bodies and / or courts, attention should be paid to the decisions of the European Court of Human case Rights Punzelt v Czech Republic, who is about, what as regards the risk of the applicant's absconding, the Czech courts noted, in particular, that the applicant had earlier absconded from the criminal proceedings in Germany, that he had numerous business contacts abroad and that he risked a relatively heavy penalty. In the Court's view, this reasoning is «sufficient» and «relevant» and it outweighs the arguments put forward by the applicant.

You should also pay attention to the decision Mamedova v Russia which states that the domestic courts gauged the applicant's potential to abscond by reference to the fact that her accomplice had gone into hiding. In the Court's view, the behaviour of a co-accused cannot be a decisive factor for the assessment of the risk of the detainee's absconding. Such assessment should be based on personal circumstances of the detainee. In the present case, the domestic courts did not point to any aspects of the applicant's character or behaviour that would justify their conclusion that she presented a persistent flight risk. The applicant, on the other hand, constantly invoked the facts mitigating the risk of her absconding. However, the domestic courts devoted no attention to discussion of the applicant's arguments that she had no criminal record, had a permanent place of residence and employment in Vladimir, a stable way of life, two minor children, and that her father had been seriously ill. They did not address the fact that the applicant had had an opportunity to flee after the search of her flat but she had remained at the investigator's disposal. In these circumstances, the Court finds that the existence of the risk of flight was not established in the present case.

Regarding the risks of illegally affecting the victim, witness, other suspect, accused, expert, specialist in the same criminal proceeding and preventing criminal proceedings in another way, the lawyer should use the following decisions of the European Court of Human Rights. First of all, this is the case Letellier v France who is about, what the Court accepts that a genuine risk of pressure being brought to bear on the witnesses may have existed initially, but takes the view that it diminished and indeed disappeared with the passing of time.

Secondly, this is a case of Kauczor v Poland in which it is said that according to the authorities, the likelihood of a severe sentence being imposed on the applicant created a presumption that the applicant would obstruct the proceedings. However, the Court would reiterate that, while the severity of the sentence faced is a relevant element in the assessment of the risk of absconding or reoffending, the gravity of the charges cannot by itself justify long periods of pre-trial detention. Furthermore, the Court observes that the risk that the applicant would tamper with the evidence was not sufficiently justified by the authorities when deciding to extend his pre-trial detention. The Court notes that the Government relied on a presumption that the applicant would obstruct the proceedings and tamper with evidence because he had not pleaded guilty to the offences charged. In so far as the domestic courts appear to have drawn adverse inferences from the fact that the applicant had not pleaded guilty, the Court considers that their reasoning showed a manifest disregard for the principle of the presumption of innocence and cannot, in any circumstances, be relied on as a legitimate ground for deprivation of the applicant's liberty. Having regard to the foregoing, the Court concludes that the grounds given by the domestic authorities could not justify the overall period of the applicant's detention. In these circumstances it is not necessary to examine whether the proceedings were conducted with special diligence.

Regarding the last risk, namely, that a person may commit another criminal offense or continue a criminal offense in which he is suspected, an accused lawyer should pay attention to the case on § 134 cases of Aleksandr Makarov v Russia: in a number of the detention orders the domestic courts cited the likelihood that the applicant would reoffend as an additional ground justifying his continued detention. In this connection, the Court observes that the judicial authorities did not mention any specific facts supporting their finding that there existed a risk of the applicant's reoffending. Furthermore, the Court does not share the national authorities' opinion that in a situation when all charges against the applicant, save for one, were brought against him in respect of his actions as the mayor of Tomsk and he was suspended from that position, there was a real danger of the applicant committing new offences.

In advocacy practice, when giving legal assistance during the selection of a preventive measure for the full and complete representation of client's lawyer's interests, it is necessary to refer to the practice of the European Court of Human Rights, since its decisions are taken into account by national courts.

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KOTSKULYCH V. V.

Uzhhorod National University,
Associate Professor at the Department of Constitutional Law and Comparative Law, PhD in Law

INDEPENDENCE OF JUDGES IN THE CONTEXT OF THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Key words: *judges, justice, European Court of Human Rights, discussions, trial.*

Rules relating to the independence of the judiciary – the method of appointing judges, the question of security during and outside of the activity, the way in which their wages are determined, and other conditions of service designed to guarantee the freedom of judges from external pressure and independent service the law.

It is also regulated that the rule of law is a part of the common heritage of the parties that signed the European Convention on Human Rights in the preamble. Thus, the independence of judges requires the rule of law and is inseparable from the very concept of justice.

It follows from the practice of the European Court of Human Rights that the criteria for assessing the independence of a judge are: the procedure for the selection and appointment of judges, the term of authority determined by the law; guarantees of external pressure, providing for the securing of internal and external independence of judges; external signs of independence; while the existence of safeguards against external pressures – including pressure on budget issues – and whether judiciary is shown as an independent and impartial.

An international court or national court that does not adhere to the principle of independence can not be legitimate and, as a result, without legitimacy, it can not be effective [1, c.49-51]. Legitimacy is a complex concept, but in the context of the issue under study, it can be described as the respect and support of the ECtHR by the parties concerned, which is the confidence in the Court in resolving the case, understanding the legal nature of the Convention (as a human rights document) and its provisions.

The practical application of the rules of procedural law must be implemented through proper protection of the rights and freedoms of the person who appealed to the court, as well as taking into account the defining principle – the adversarial parties.

Independence of the judicial system is intertwined with the impartiality of judges in the exercise of their powers of administration of justice. At the same time, independence is considered in international norms rather as the independence of the judicial branch of power in the system of distribution of power, and impartiality, in turn, finds its manifestation directly in the adoption of a fair and equitable solution.

The impartiality of judges is determined by the judgment of the European Court of Human Rights in the case of «Belukha v. Ukraine» (Statement 3949/02) on subjective and objective criteria. Thus, the subjective bias in this case is that the head of the court could be an interested person, since one of the parties (the construction company) provided free services for the repair of the courthouse. In turn, circumstances may be examples of objective bias, if the judge: in the same case, was an investigator, a prosecutor; carried out consideration of the case in the first instance, and then – in the appellate court. The subjective criterion involves taking into account the legal position and behavior of the judge, the objective – determines the provision of impartiality when taking a court decision [2, p. 101].

Regarding the immutability of judges, it is undoubtedly an important element of the principle of the independence of judges. The immutability (immutability) of judges, according to the conclusions of the ECHR, does not necessarily have to be directly enshrined in the norms of law. Provided that in fact the immutability is recognized, and if possible, it is possible to conclude that there are other guarantees that give reasons to consider the judges unchangeable, the observance of such principle is considered to be realized.

The Institute of Immovability depends on the mechanism of formation of the judiciary corps. Today in the academic circles there are numerous discussions concerning the appointment of judges for a term of several years. For example, Israeli professor Shimon Sheetrit argues that this method does not ensure the implementation of the principle of independence while a judge is in office, since it provides the possibility of appointing a «desirable» judge, thus allowing the «undesirable» to lose a post without further upgrading [3, p.182].

Currently, the legislator has abandoned the five-year appointment as judge to the President of Ukraine for the first time and the subsequent re-election by the Verkhovna Rada of Ukraine. There was a clearly defined legislative regulation of the institute of immutability of judges, the positive point of which is the abolition of the so-called «trial term». The immutability of judges is also characterized by «establishing an exhaustive list of grounds according to which a judge may be dismissed. According to Art. 126 of the Constitution of Ukraine, the judge holds office indefinitely».

However, the issue of influence on judges for the adoption of an unlawful decision in favor of certain parties to the trial remains unresolved. This is evidenced by the significant number of appeals to the Council of Judges of Ukraine. The main factors of pressure are the most widespread actions by public organizations and associations, bodies of judicial self-government, separate groups of people, and also prosecutor's offices.

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MYKHAILIUK G. O.

National University «Kyiv Mohyla Academy»,
Associate Professor of International and European Law Department,
Lead Scientific Advisor, Industrial Property Department,
Scientific – Research Institute of Intellectual Property National Academy
of Legal Sciences of Ukraine, Dr. habil., Associate Professor

IMPACT OF JUDICIAL REFORM IN UKRAINE ON THE DEVELOPMENT OF LEGAL METHODOLOGY AND INTELLECTUAL PROPERTY LAW

The essence of methodological principle of interpretation by the European Court of Justice *Marleasing* (derived from the name of one of the parties to the case) has been examined in the article. It is dominant in the part of non-actional proceedings and is supported by the principle of proportionality, as well as national regimes of intellectual property. It has been determined that this principle is appropriate to be introduced to the civil procedural activity of judiciary in Ukraine. Its' goal is to recognize the freedom of states in order to bring their own legal systems closer to the European legal order through the evolutionary process of regulatory compatibility (parallel action of two systems: the national legislation of the EU Member States and the EU law in the context of their structural interaction through gradual harmonization, adaptation to the EU law) without prejudice to their «legal rationality».

Key words: *methodology, legal system, European law, interpretation, intellectual property*.

The amendments to the Constitution regarding justice promise to extend the constitutional underpinning for a more independent judiciary. In particular, the reform of the judiciary is a key conditionality imposed by the EU, IMF and other donors to Ukraine [1, p. 40].

Meanwhile, constitutional rights to objects of intellectual property law urge for development with regard to the institutional reforms and improvements related to the main form of civil rights protection, namely judicial protection (based on Article 55 of Constitution of Ukraine [2]), as a result of the establishment of the High Court on Intellectual Property Issues, as well as changes in the scope and content of powers of the new Supreme Court. Nowadays specialized courts for intellectual property exist in a number of countries, including Germany, Austria, Switzerland and the UK [3, p. 63-64]. Their functioning in these countries has positively affected the quality of the cases on intellectual property and has significantly reduced the time it takes to process them.

It has been widely acknowledged, that Ukraine pertains to the group of countries with codified system of law, however recently the possibility of broader functions for the new Supreme Court has appeared [4] i.e. its judicial opinions may acquire precedential character.

The author of the present paper tends to think that it is important to consider the establishment of a special chamber to review disputes arising on the Internet as a part of the jurisdiction of the High Court on Intellectual

Property Issues [5] (as a result of the constitutional reform and creation of the High Court on Intellectual Property Issues). Moreover, it is highly important due to the constant increase in the number of Internet infringements.

The introduction into the national legislation of a provision that allows the right holder to claim compensation instead of damages resulting from the unlawful use of a trade name or a signage that is confusingly similar to another is justifiable on the grounds that it will provide an opportunity for better protection of rights to commercial signage, because sometimes, to prove the size of damages is extremely difficult. Compensation, in this type of case, acts as an alternative to damages.

As a result of a country's accession to the EU, primary and secondary EU law becomes a part of the national law, which still maintains a certain autonomy. Additionally, the EU authorities promote the correctness and unambiguity of the application of EU law within national jurisdictions [6, p. 595]. This is manifested primarily in the functions of the ECJ which can provide a detailed interpretation of appeals from national courts in cases in which there are doubts about the interpretation of certain legal norms of the EU.

Marleasing is a methodological principle of ECJ interpretation (a term introduced by J. Pila [7, p. 229]), supported by the principle of proportionality and national intellectual property regimes. The central element of the principle of proportionality on the basis of methodology is the doctrine of indirect effect, i.e. the Directives can be applied in private law disputes and in relations between private individuals (however, the decision in the case of Marleasing insists on using only the provisions of directives themselves for resolution in such relations) [8, p. 766]. A dispute is solved by using both the Member States law and the Community law, where the norms of the EU law provide the possibility of broad interpretation and the internal rules provide for a maximum consideration of local traditions and characteristics with respect to the dispute.

It is recommended to introduce Marleasing to the civil procedure activities of the judicial bodies of Ukraine for a number of reasons, among them it is considered as recognition of the freedom of States to bring their own legal systems towards the European legal order through an evolutionary process of regulatory compatibility (parallel activity of the two systems: the national legislations of the EU Member States and the EU law in the context of their structural cooperation through a gradual harmonization and adaptation of national legislation with the EU law [9, p. 121; 10, p. 358]) without prejudice to their «legal rationality».

Further legislation will definitely be required to provide the legal basis for the activity of new judicial institutions (the High Intellectual Property Court and the High Anti-Corruption Court) and fruitful implementation of all judicial reforms.

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NIKOLAJCHENKO O. V.

Saratov State Law Academy,
Associate Professor of the Department of Civil Procedure,
PhD in Law

EVOLUTIONARY INTERPRETATION IN JUDICIAL LAW ENFORCEMENT AS A VECTOR OF LAW DEVELOPMENT

A new challenge of our time was the evolutionary interpretation of law, which is gaining popularity in the law enforcement activities of courts. The reasons for this are different, ranging from imperfections and gaps in the current legislation, and ending with insufficient scientific validity of the evolutionary interpretation of law.

Key words: *evolutive interpretation of the law, discretion of judge, the analogy of law, the analogy of the law, authorised by a court procedural duties, court, litigation.*

A unique method of development of modern Russian law is its evolutionary interpretation, the essence of which is that in its application, the content of the legal norm is revealed in new facets. The interpreter finds in this interpretation a different meaning, corresponding to modern ideas about the current (very dynamic) law and order and morality, the level of economic development of society and the achievements of modern, especially legal, science. Evolutive interpretation is characterized by mostly the enforcers who are consolidating their activities on the protection of the violated rights, freedoms and protected by law interests. The problem, which is increasingly found by scientists, analyzing the achievements of theoretical law and problematic issues of law enforcement, is the discrepancy between the conceptual framework proposed by the legislator, and the final result, expressed in the adoption of the final act, most directly affecting the inviolable-guaranteed human rights.

Of course, the legal tools and factual circumstances determine the results of the trial, but it is the freedom of discretion of the judge who resolves a civil dispute that determines the issuance of the final judicial act. The peculiarity of the implementation of judicial discretion is that not all life situations can be regulated by specific rules of the law. This is due, as a rule, to the wide scope of public relations that require legislative regulation, and with the emergence of new property relations as a result of the constant development of society and, as a consequence, the expansion of the material subjective right of the person. And here an integral component in the adoption of the correct legal act is the discretion that determines the possibility of choosing one of several alternative decisions by the court. It is this feature that determines the existence and role of freedom in the law enforcement aspect of the court. In order to resolve a dispute settled only by General rules, the court must apply its own knowledge and experience, that is, act at its discretion to «specify abstract rules for application to particular cases».

Difficulties of scientific and organizational nature, the inability to conduct a study of «successful» and «unsuccessful» judicial discretion due to the specifics of this phenomenon and the influence of the personal factor forced scientists to look for a way out of the seemingly impasse, turning to the analysis of legal norms governing the institutions of analogy of law and analogy of law.

Despite the complexity and diversity of concepts analogy of law and analogy of law, no one doubts their existence. In this regard, it is methodologically justified to go directly to the ratio of the analogy of law and the analogy of law with judicial discretion.

In procedural science formed several positions on the relationship of judicial discretion and the analogy of law and law. According to the first view, the analogy does not depend on judicial discretion. A. T. Bonner explains it this way: «the Resolution of the case on the basis of the analogy of law or law can not be recognized as a form of judicial discretion, since there is no freedom in choosing solutions. In this case, the court must implement the law governing the disputed legal relationship» [1]. Thus, in the case of an analogy of law or a law, the court must be guided by a legally established norm, the application of which is the only true one in the issuance of a judicial act. However, this situation implies cases where there is a clear similarity of relations. In other cases, the court must independently determine the signs of which rule most indicate similarity with the signs of the relationship in question.

Fulfilling duties on the clarification of the factual circumstances and the determination of the law that should guide the resolution of civil cases and the establishment of the legal relationship of the parties, the judge implements the subjective discretion even before the moment will come to the necessity of application of analogy of the law in the absence of the necessary legal norms.

If we consider the use of analogy only as a creative process, that is, entirely dependent on the knowledge, experience, competence of the judge, it can lead to judicial arbitrariness, since it will be impossible to point to the wrong decision. Therefore, if we assume that the court, using an analogy, is not free, and its activity is reduced to the use of exclusively logical structures to identify the only correct solution, the judicial discretion is not connected with the analogy. If the court is free to choose similar relations and the process of establishing a connection between them is considered creative and situational, then the analogy can be considered a form of judicial discretion.

Particular attention should be paid to what is limited to the court, applying the analogy of law. If the analogy of civil procedural law in accordance with part 4 of article 1 of the code of civil procedure is applied, the court must proceed from the principles of justice in the Russian Federation. If the analogy of civil law (part 3 of article 11 of the code of civil procedure) is applied, the court is limited to the General principles and meaning of the legislation. But these restrictions have a blurred border, since it is impossible to clearly define what the legislator understands by the terms «General principles» and «the meaning of the legislation». Applicable to the analogy of civil procedure law, the problem also remains open, because there are several ways to consolidate the principles: textual, when the principle is directly enshrined, and semantic, when the content of the principle is derived from a number of rules. The most difficult to determine the limits is the semantic method, because each law enforcement officer or researcher puts his subjective understanding of the content of a principle.

Some law enforcers may infer from the content of the rules principles that are not recognized by all, which may raise doubts about the correctness of a court decision or other act.

In the resolution of Plenum of the Supreme Court of the Russian Federation of 19.12.2003 № 23 «About the judgment» it is possible to notice that the Supreme judicial body understands by the lawful decision such, «when it … is based on application in necessary cases of analogy of the law or analogy of the law», and also h. 3 Art. 11 of GPK of the Russian Federation where cases of application of analogy are directly specified. In this regard, the positive links of the evolutionary interpretation of the right to development of the law in General cannot be categorically denied. Thus, the Supreme Court of the Russian Federation, acting as a body supervising the activities of the courts, stabilizes the law enforcement process to further ensure the full protection of the rights and interests of stakeholders. In addition to Supervisory powers, the Supreme Court has the right to interpret the normative provisions of the legislation. In turn, the constitutional Court of the Russian Federation in the sphere of civil proceedings carries out: interpretation of the Constitution of the Russian Federation; the decision of questions of compliance of the Constitution of the Russian Federation of the legal norms which are subject to application in civil proceedings, at requests of courts; consideration of complaints of violation of constitutional rights and freedoms of citizens by the law applied in a particular case.

A judge or judicial body acting collectively in resolving a case on the merits is guided by legal norms on the basis of internal conviction and judicial discretion, based on an assessment of the actual circumstances of the case, based on their own knowledge, experience and other subjective moments. In this regard, many participants in civil proceedings appeal against the issued judicial act (decision) in the hope that the opinion of a higher court will differ in a more favorable direction for the appellant.

Recognizing that normative legal acts are adopted in a reference form (international treaties, conventions, Constitution), and the legislator does not always have the opportunity due to the intensive development of public relations to adopt a convenient legal act that meets the requirements of the time, judges often have to maneuver, using an expansive form of interpretation of the law.

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PASECHNYK O. V.

National University «Odesa Law Academy»,
Associate Professor at International and European Law Department, PhD in Law

THE EUROPEAN COURT OF HUMAN RIGHTS PRACTICE IN THE ORGAN AND TISSUE TRANSPLANTATION SPHERE

Key words: *transplantation sphere, Convention on Human Rights and Fundamental Freedoms, practice of the ECHR, organs and tissues.*

The work of the European Court of Human Rights is called «a living instrument». Due to the practice of the European Court of Human Rights the list of human rights, which is guaranteed by the 1950 Convention on Human Rights and Fundamental Freedoms and its protocols, is expanding. Medical cases did not become an exception to the evolutionary activity of the European Court of Human Rights. To this cases we can include cases related to transplantology.

The most famous cases concerning transplantation are Petrova v. Latvia, Complaint No. 4605/05, judgment of June 24, 2014) [1] and Elberte v. Latvia (Elberte v. Latvia, complaint No. 61243/08, judgment of 13 January 2015) [2].

The case "Petrova v. The Republic of Latvia" concerned the death of the applicant's son from the injuries sustained during road accident, after which he was taken to a hospital where he had a trepanation of the skull. After his death, laparotomy was carried out on his body, during which his kidneys and spleen were removed for the purpose of transplantation of organs. However, the applicant was not informed of the deterioration of her son's health and the removal of her son's organs without her consent or prior consent of her son to these actions. The applicant find out what happened, nine months later, during a criminal case concerning a road accident that killed her son. After filing a claim the applicant made decision that the removal of her son's organs was in accordance with Latvian law and refused to institute a criminal case about the transplant without consent, because at the time of her son's death the law was in force which did not oblige medical workers to seek and inform the deceased relatives about the possible removal of organs, as well as to explain their right to object against the removal of his organs or tissues.

In the case of Petrova v. Latvia (Petrova v. Latvia, complaint No. 4605/05, judgment of June 24, 2014), the ECHR get a conclusion that there had been a violation of Article 8 (right to respect for private and family life) of the 1950 Convention. [3]. It should be noted that this article is described by international lawyers as "umbrella", which expands the scope of the 1950 Convention and protocols to it. It was established that the law of the Republic of Latvia of organ transplantation at the time of the death of the applicant's son was insufficiently clear, which led to the emergence of circumstances in which the applicant, as the closest relative of her son, had certain rights regarding the removal of his organs, but was not informed. Consequently, the ECHR decided that intervention in the right to respect private life was not provided for by Latvian law, as required by Article 8 of the 1950 Convention, because Latvian law, formally providing close relatives of the deceased right to object the removal of its organs, was not formulated fairly clear and did not provide effective protection against arbitrariness. Latvia's legislation did not ensure proper communication of deceased relatives about the transplantation there organs and tissue. So they could not object it this decision.

In the case of Elberte v. The Republic of Latvia, the applicant's husband died as a result of a road accident. The case «Elberte v. The Republic of Latvia» concerned the removal of body tissue from applicant's husband by medical experts after his death without her consent. Without the consent of the applicant, due to the State-approved agreement, the tissue was removed from the body after autopsy and sent to a pharmaceutical company in Germany to create bio-implants in accordance with the state contract. She knew about the situation two years after her husband's death, when a criminal investigation was launched in the Republic of Latvia in connection with the assumption of large-scale illegal organs and tissues remove from the dead. However, the local authorities did not establish any form of crime.

The applicant complained in particular that the removal of her husband's tissue was without her prior consent. She complained that her husband’s dignity, individual integrity and the inviolability had been violated. She also complained about psychological suffering, when she remained in a state of uncertainty about the circumstances of removing tissue from the body of her husband and her husband's body was returned to her after the opening with his legs connected.

This case also concerned the gaps in the Law of the Republic of Latvia "On the protection of the body of the deceased and the use of human organs and tissues in medicine," as in the case of Petrov v. The Republic of Latvia.

The ECHR made a decision that there had been a violation of Article 8 (right to respect for private and family life) and violation of Article 3 (inhuman or degrading treatment) of the 1950 Convention. It was established, in particular, that the law of the Republic of Latvia regarding requirements for obtaining consent for tissue removal has lack of clarity and does not have sufficient legal safeguards against arbitrariness, although it lays down the legal framework that allows the closest relatives to consent or refuse to remove tissue, this law does not clearly define the obligations or decision-making procedure by experts for obtaining consent [3]. The method used to implement the rights of relatives to express their wishes and the extent of the responsibilities for obtaining consent have become like stumbling block in national practice. The governance of Latvia differed in their opinion on the meaning of the applicable norms of domestic law. The Center for Forensic Medicine and the Latvian Security Police came from the fact that there is a system of "alleged consent" in the state, while investigators believed that the legal system of Latvia was based on the principle of "informed consent", and the removal of organs and tissues is possible only with the consent a donor (in his life) or his relatives [4, c. 38]. For that time when the Latvian security police agreed with the interpretation proposed by the prosecutor's office, and decided that it was necessary to obtain the consent of the applicant, the limitation period for prosecution had already expired. Similar disagreements between the governance give us an opinion that there is a lack of clarity in the legislation of Latvia.

The ECHR also found that the applicant had a long period of suffering because she did not know method and purpose of removing tissue from her husband's body. According to Article 3 of the 1950 Convention human body must be kept even after death in the organ transplantation.

The practice of the ECHR says that there must be the right to consent to the transplantation of human organs and tissues, as well as the right to dignity during transplantation. Thus, the decision in Petrov v. Latvia and Elberte v. Latvia affects the extension of the substantive jurisdiction of the ECHR, as well as the importance of ethical medical standards in the realization of human rights.

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SAMBOR M. A.

Main Department of the National Police in Chernihiv Region,
Chief of the Monitoring Sector of the Pryluky Police Department,
Corresponding Member of the Academy of Sciences
of Higher Education of Ukraine, PhD in Law

CONTINUITY IN UKRAINE'S ADMINISTRATIVE-TORT LAW: LEGISLATION, NECESSITY OR VECTOR FOR DEVELOPMENT

Key words: *administrative social relations, Code of Ukraine on Administrative Offenses.*

The contemporary development of Ukrainian society, including its legal system, necessitates a conscious scientific approach to the reception of foreign experience in the legal regulation of administrative and delinquent social relations and the continuity of the legal system of the Soviet period of the country's existence. Despite the political vectors of the direction of the development of the legal system in the national legal systems of the countries of the European Union, as constantly emphasized by Ukrainian politicians and statesmen, V. Averianov wrote that domestic law of law in its considerable part continues to exist in captivity of theoretical contradictions and even erroneous postulates [1, p. 16] formed in Soviet times. Unfortunately, we note that most of the research in the field of administrative and tort law is introverted, when the scientific research and the basis for their implementation are exclusively addressed to the analysis of the doctrinal views of domestic scholars, as well as the succession in the approaches to the formation of amendments and additions to the current legislation on administrative offenses are exclusively in the practice of the Soviet period.

As a result, the current norms of Code of Ukraine on Administrative Offenses (CUAO) not only track the continuity of the Soviet period of Ukraine's existence, when issues of state-and-state regulation of all social relations without exception, including those involving the bringing of a person to administrative liability, were put on the foreground, and changes to CUAO occur in not the best traditions of succession as separate norms of law, as well as institutes and branches of administrative-tort law. In this context, a clear line is followed not only by neglect of the rights and freedoms of a person and a citizen, which must be based on universally recognized principles of the rule of law, respect for the rights, freedoms and interests of man and citizen, equality of human rights, participants in proceedings, etc., and vice versa – asserting a leading role links of state bodies, their undoubted rightness. At the same time, such a reference to the principles of the rule of law and law (which is stated in the CUAO) is more likely to be given to universal ideals than the real basis for the exercise of powers to document administrative offenses and bring perpetrators to administrative liability [2, p. 254].

Continuity (latin continuitas – continuity) – continuity in the development of law. The problem of continuity arises when a political regime in the state changes during the social revolution, in the emergence of new states or the cessation of their existence, with territorial changes in the state, writes V. Honcharenko [3, p. 318]. Of course, at the first stages of the development of an independent legal system, it is impossible to do without the use of the rules of law inherited from the USSR and the Ukrainian SSR, since, completely abandoning the continuity of the legal norms of the Ukrainian SSR, Ukraine at the dawn of its statehood would not have a universal regulator of social relations, which is right.

Administrative-tort law deals with complex systems related to violations of established rules of conduct that are in the spheres of regulation of various branches of law, whose norms develop nonlinearly and difficultly predictable. A profound understanding of the subject-objective branch of administrative-tort law with the use of outdated approaches and doctrines of administrative liability is impossible. First of all, this is due to the fact that the regulatory norms protected by the administrative and tort law and legislation in the overwhelming majority are significantly more dynamic and more actively subject to changes due to the convergence of the Ukrainian legal system with the national legal systems of the Western European countries and the European Union in as a whole, while administrative and tort rules, without exaggeration, remain in captivity of inherited totalitarian approaches to legal liability, laid down in the USSR.

The modern theory of administrative-tort law has no unity. Scientists are searching and trying to build doctrines for the development of individual norms, institutions, while the holistic doctrine of administrative-tort law in the country is absent. The above, in our opinion, is due to the lack of due attention from the state to this problem. Without exaggeration, the hundreds of changes experienced by CUAO were so fragmented that, instead of removing certain gaps and collisions, in part, on the contrary, they lead to an even greater gap in the quality of legal regulation related to the legal certainty of the rules of the administrative and tort law, their clarity, justice For example, I would like to emphasize the unrestrained desire to establish administrative liability for the owners of vehicles, despite the fact that the Constitutional Court of Ukraine, such an approach to security rules is considered unconstitutional.

Today, the evolution of social relations really indicates the path to the globalization of law, the adoption of common approaches in the legal regulation of social relations by the national legal systems. However, the perception and introduction of foreign experience in national legislation should not reject national traditions of legal regulation, and in this aspect the continuity of norms, the doctrines of administrative and tort law is key. Unfortunately, the administrative-tort law is for some reason seen in conservatism in the exclusive perception of the Soviet principles of administrative liability, when the codified acts in the area of administrative-tort law did not have a clearly defined object of legal regulation. The norms of CUAO clearly demonstrate that the basis of administrative liability is not a way of applying legal liability (extrajudicial), not a special subject of administrative delinquency – an official of the authorities and administration, the subject of public-legal relations, etc. The modern CUAO is a vivid mix of diverse approaches that demonstrates the search for a holistic doctrine of administrative and tort law in Ukraine. Most post-socialist countries have adopted their own codified acts of administrative-tort law, even the Russian Federation, which recognized itself as the successor to the USSR. Particular attention deserves the issue of procedural rules of administrative and tort law. For example, Belarus adopted not only codes containing substantive rules of administrative and tort law, but also separate codes of procedural administrative and tort law. To say that the procedural administrative and tort rules in the legislation of Ukraine is, in fact, nothing to say. The specified norms represent separate milestones, which are practically unrelated to each other, which necessitates the use of considerable discretion for the entities authorized to deal with administrative offenses. Obviously, this approach has remained since the Soviet period of Ukrainian statehood. In our opinion, the presence of such discretion is due to the fact that under a totalitarian regime, no citizen could oppose the person to the state, including in terms of defending rights, freedoms and interests. As a result, the administrative-command system and its influence on administrative-tort relations were absolute, which indicated the impossibility of doubting the legitimacy, fairness and correctness of any decision by an official. The continuity introduced by Ukraine in terms of creating and building its own independent, democratic, rule-of-law state is due to the fact that with the achievement of independence, Ukraine actually continued to use the normative legal acts of the USSR and the USSR, thereby using the continuity of legal acts and norms of law [4, with. 121]. The Law of Ukraine "On the Law of Succession" of September 12, 1991, determined that the laws of the Ukrainian SSR and other acts adopted by the Verkhovna Rada of the Ukrainian SSR are in force on the territory of Ukraine, since they do not contradict the laws of Ukraine adopted after the proclamation of Ukraine's independence. As a result, CUAO continued its operation. However, such continuity should not hinder the adoption of the conceptual new administrative and tort law of Ukraine, which will be a logical extension of those regulatory norms, which will be guarded by CUAO.

Convinced that CUAO as it is, it is archaic. Its norms for today are, in the vast majority, adapted to meet the tasks of the Code, instead of having an independent influence associated with the protection of public relations.

Trying to understand the reforms in the state, we must remind that, along with the reform of regulatory norms, there should be reform of security norms, which should not become "addicts" or rely on subjective conviction in their application of individual officials, regardless whether they are representatives of the executive or judicial branches of power. The law, which applies legal liability, in this case, CUAO and administrative liability, must contain rules that are characterized if not absolute, then the maximum legal certainty, clarity not only for lawyers, but ordinary citizens.

As a result, for CUAO there is no such fundamental principle of law and a democratic society as the rule of law, observance of rights, freedoms and interests of a person and a citizen. According to the ancient Soviet-totalitarian tradition, these issues not only do not find their logical embodiment in the norms of positive administrative-tort law, but also in practice, law enforcement is not too much of a manifestation.

Ukraine, choosing a European vector of development, leaves behind an anchor that connects itself with the past. In no way, wishing to undermine the achievements of historical and legal science, we must note that those conceptual foundations of administrative and tort law, which are formed under another social system, state regime, are not suitable for modern Ukrainian statehood and society. In this regard, I am convinced that there is an urgent need not only for introducing amendments to CUAO, but for the adoption of a new or newly revised CUAO with fundamentally new fundamental principles, principles, first of all addressed to a person, protection of his rights , freedoms, interests, including from the arbitrariness of the state in the person of its organs and individual officials, which, in our opinion, can only be achieved through the adoption of high-quality administrative and procedural rules. Of course, the views on the European national legal systems should not deny their own legal heredity and national traditions of legal regulation of social relations. In this context, scientific substantiation, discussion and the empirical component of the application of new norms, based on national traditions of legal regulation, and the national legal awareness of Ukrainians, are important.

We hope that the problems raised will be the basis for large-scale scientific discussions and searches, that the legislator will listen to them and that in the nearest future this problem will be solved at the legislative level.

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TIMOFEEVA L. Y.

National University «Odesa Law Academy»,
Assistant Professor of the Department of Criminal Law,
PhD in Law, attorney, mediator

EURO-INTEGRATION AND CRIMINAL LAW POLICY

Key words: *European integration, life imprisonment, practice of the European Court of Human Rights, European values, approximation.*

The implementation of the Association Agreement between Ukraine, on the one part, and the European Union, the European Atomic Energy Community and their member states have resulted in a set of significant changes in Ukraine. European integration trends are implemented both in general terms and in separate institutes of Criminal Law (in particular, the specifics of criminal liability).

The Criminal Law of Ukraine should take into account the characteristics of the impact of global and regional imbalances and conflicts on the rule of law, as well as the urgent need to protect the safety of people on the European continent.

The Treaty establishing the European Union uses two terms: approximation and harmonization. *Approximation* involves the achievement of a certain level of compliance of the national legal system with the EU legal system, while *harmonization* is the main means of legal integration, the convergence of legal systems of the EU member states. Harmonization of the legislation of Ukraine and the EU involves harmonization of national legal norms with European norms, standards, and principles.

In this paper, it seems reasonable to speak of approximation, that is, the process of the approximate image of some objects of legal form by others, similar in nature and content to the original [1].

It should be noted that Ukraine has already taken some steps towards such an approach, but there are still many outstanding issues, in particular, methodological ones. First of all it is necessary to get closer to European values and principles.

It is very important that Ukraine and the European Union have common values (it is emphasized in the Association Agreement). There is respect for democratic principles, the rule of law, good governance, human rights and fundamental freedoms, including the rights of people belonging to national minorities, non-discrimination of people belonging to minorities, and respect for diversity, human dignity and commitment to the principles of a free market economy that contributes to Ukraine's participation in European politics.

All of these values are humanistic and reflected also in other documents of the Council of Europe, the EU, as well as international documents, the Convention for the Protection of Human Rights and Fundamental Freedoms, the practice of the ECHR, etc. They (values) are really common and not only for the EU and Ukraine but also for many countries of the world because they are universal. But the mechanism for their implementation is not always effective.

Respect for democratic principles, human rights and fundamental freedoms, as defined in particular in the Final Act of the Conference on Security and Cooperation in Europe (Helsinki, 1 August 1975) and the Charter of Paris for a new Europe (Paris, 21 November 1990), as well as in other relevant human rights instruments among them the Universal Declaration of Human Rights of 1948 and the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, as well as respect for the rule of law principle, should form the basis of the domestic and foreign policy of the Parties and are the main elements of the Agreement. Ensuring respect for the principles of sovereignty and territorial integrity, the inviolability of borders and independence, as well as the non-proliferation of weapons of mass destruction, related materials, and means of delivery, are also the main elements of the Agreement (Article 2 of the Association Agreement).

The Association Agreement contains several important areas of humanistic content that are directly related to the criminal law policy and which Ukraine seeks to implement and to become closer to the EU legislation. Among them, in particular, – counteracting illegal migration and trafficking in human beings, organized crime, terrorism, environmental protection, strengthening of people-to-people contacts.

It is important that the acts of the European Union and the Council of Europe not only declare certain principles but also provides specific mechanisms for their implementation, as well as demonstrate a response to their violation.

The EU shows a quick reaction to change social relations. For example, modernity is characterized by the rapid development of information technology, the Internet of Things, and, accordingly, the spread of human rights violations, using information technologies, including the commit of crimes.

According to *Declaration by the Committee of Ministers on the manipulative capabilities of algorithmic processes* (Adopted by the Committee of Ministers on 13 February 2019 at the 1337th meeting of the Ministers' Deputies), Member States must ensure the rights and freedoms enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5) to everyone within their jurisdiction, equally offline and online, in an environment of unprecedented political, economic and cultural globalization and connectedness [2].

It should also be noted that the provisions provided for Declaration are based on the fact that the Council of Europe member States has committed themselves to building societies based on the values of democracy, human rights and the rule of law. This commitment remains and should be honored throughout the ongoing process of societal transformation that is fuelled by technological advancements.

It is necessary to form the theory of the European integration policy of Ukraine in order to provide the means of Criminal Law of the European integration course of Ukraine against the background of the need for synchronization of criminal and legal mechanisms of Ukraine and the EU. In such a situation, strategic guidelines, tasks, directions and objectives of criminal legal influence on the crime against the bases of the economy, the order of migration, environmental security, cyber security, as well as criminal-law support of anticorruption security of economic activity and means of their achievement are required; sources, as well as procedural elements and instruments of European criminal law. The complex holistic approach based on mutual recognition of all parties rights and obligations should give positive effort in combating crime and new law constructing. Thus, new criminal legislation structure and its theoretical background based on multidisciplinary matrix approach had to be analyzed and formulated from European Criminal Policy (EC and EU rules that affecting Ukrainian legislation, judiciary, and preventive practice) [3, p. 64].

In particular, it is necessary to make more use of European Court of Human Rights practice. For example prolonged deprivation of liberty, including life imprisonment, without a legitimate reduction procedure is not humane and is contrary to fundamental human rights in the meaning of the European Court of Human Rights (Vinter and Others v. United Kingdom, Applications № № 66069/09, 130/10 і 3896/10, 9.07.2013; Hutchinson v. United Kingdom. Applications № 57592/08, 17.01.2017 and other). The practice of replacing life imprisonment by deprivation of liberty in the form of pardon in Ukraine is not entirely consistent with the position of the ECtHR, in particular because there is no clear legal mechanism for reviewing the decision to impose a life imprisonment within a certain period of time. Consequently, there is a need to justify the mandatory review of life imprisonment within a certain period. It is necessary to harmonize Criminal Law with the practice of the ECHR.

The task of Ukraine on the path to European integration are transformations in terms of approximation to the effective realization of European values and European legal thinking. Criminal Law should contribute to the protection of human natural needs, in particular in the area of security and freedom.

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BATAN YU. D.

National University «Odesa Law Academy»,
Assistant Professor at the Department of Constitutional Law

THE EUROPEAN COURT OF HUMAN RIGHTS AS AN INSTITUTION WITH THE PREVENTIVE PURPOSE

Key words: European Court of Human Rights, prevention of human rights violations, monitoring and assessment actors, case of Mikhno v. Ukraine.

Monitoring and assessment actors for preventing human rights violations represent the largest category. They contain participants of preventive mechanism, which have co-ordination (signing, expertize), validating, registration, appeal (handling complaints, ability of chance or reverse of judgement), investigation and punitive (ability to investigate offences and prosecute), monitoring (accounting, data collection and analysis, inspection and attendance a certain places), inspection (holding inspections and audits), recommendation (ability to provide recommendations and opinions) and other monitoring and assessment authorities concerning the activity of other subjects.

European Court of Human Rights (*hereinafter – the ECtHR*) is one of monitoring and assessment bodies aimed to prevent human rights violation. This paper aims to demonstrate the preventive activity work of ECtHR.

In 1997, professor U. Kriebaum pointed out that "strictly speaking, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment is the only purely preventive human rights instrument, … Inter-American Human Rights Court, the Inter-American Human Rights Commission and of their counterparts on the European and the global level …, all of them being elements of human rights instruments, have the prevention of human rights violations as their prime objectives" [2, p. 159]; "only one international human rights instrument primarily devoted to prevention has been established, viz. the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment" [2, p. 188].

So, the conclusion about the preventive purpose of the normative act is made in case when the word "prevention" is mentioned in its title or when it is clearly defined in the aim of its own. In fact, the presence or absence of the word "prevention" in the title or text of a convention or other normative act can not reveal the presence or absence of a preventive purpose of a certain act.

European Court of Human Rights functioning, assignment of individual and general measures, interpretation of the Convention for the Protection of Human Rights and Fundamental Freedoms as the main fence against violations of human rights on the continent, etc., all this reflect the preventive purpose of the ECtHR, no matter how many times the word «prevention» is used in its normative acts or judgements.

1. The purpose of establishment

The previous experience of massive violations of human rights by the Nazi regime in Germany and other territories being occupied by the Third Reich caused the creation of a European system aimed to protect fundamental human rights and freedoms. Functioning of supranational institutions aimed at guaranteeing of human rights in case of their violation by the state became the basis of such system [5, p. 65]. That is, the fact of emergence of the European Court of Human Rights as an institution itself was caused by need to prevent the possibility of new massive human rights violations by the state. Moreover, at that time, the German State rarely violated its own laws, but these very laws violated human rights. To prevent such violations in future it was necessary to establish additional supranational institution that would primarily consider disputes between the individual and the state regarding violations of human rights by the last one.

2. Equal distance from the both parties

Despite the concept of separation of powers, there is still remains to be influence on the judiciary be the rest authorities. Instead, the European Court of Human Rights, being equally far-off distant from the applicants and the State, prevents the possibility for public authorities to take an advantage of such effect or even to create it.

3. Application of general and individual measures

If the European Court of Human Rights recognizes the violation of human rights guaranteed by the European Convention on Human Rights, the state must pay the material and, sometimes, moral compensation awarded by the ECtHR, as well as eliminate the violation of the rights of each person prevailed at the ECtHR, and at last take measures aimed to prevent similar violations. The very fact of the power of the ECtHR to award compensation, to resume the status applicant had before the violation, etc., should be interpreted as a preventive mechanism, since the state is more interested in eliminating the causes and conditions of violations of certain human rights, without bringing the ECtHR action.

4. Application of ECtHR practice and experience in domestic law-making and enforcement

Besides, ECtHR has a preventive assignment. That is because deputies and other law enforcement bodies usually take into account possibility of suing the ECtHR while passing and applying laws. The activity of a certain judge analyzed via its judgements also could be recognized as preventive phenomenon of ECtHR. The same could be stated regardless the laws which violate Convention for the Protection of Human Rights and Fundamental Freedoms. But it is important to be previously established by the ECtHR.

Establishment of an obligation to pay damages to a person who suffered with an unfair judgement or illicit act or omission committed by a public authority or its officers could be an additional preventive measure to avoid human rights violation.

5. Application of punitive measures.

Paulo Pinto de Albuquerque, the ECtHR's judge, and Anne van Aaken prove that the ECtHR "uses punitive damages implicitly" and believe that the

Court should do so more frequently in the future in order to prevent repetition of wrongful conduct by states [4, p. 230].

Punitive or exemplary are the damages which “being established with the purpose of … preventing repetition of wrongful act by the offender, or emulation by third parties, without being limited to mere compensation for the pecuniary and non-pecuniary losses caused to the claimant, including loss of profit” [4, p. 230].

6. Interpretation of the Convention

The ECtHR prevents ambiguity, legal uncertainty, discrimination, and at last violation of the relevant conventional rights by interpreting the Convention’s provisions on this very rights as well as their realization, both the interpretation of proportionality (adoption of the three-part proportionality test) of human rights restrictions.

For example, in the judgment of November 6, 2018 in the case of Burlia and Others v. Ukraine, the ECtHR pointed out the effectiveness of measures to prevent the risk of ill-treatment (Article 3): “not every risk of ill-treatment could entail for the authorities a Convention requirement to take measures to prevent that risk from materialising. However, the required measures should, at least, provide effective protection in particular of children and other vulnerable persons and should include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge” [1, para 124].

On the other hand, in its judgement of September 1, 2016 in the case of Mikhno v. Ukraine, the ECtHR stated: “in the applicants’ view, the State’s responsibility was engaged … on account of a failure to put in place an adequate general legal and regulatory framework for organising air shows and for inadequate planning and preparation of the air show in question” [3, para 126]. “In this relation, it is to be noted that in the aftermath of the accident a number of new regulatory acts were passed domestically with a view to improving relevant safety standards. … where the State is required to take positive measures the choice of means is in principle a matter that falls within the Contracting State’s margin of appreciation” [3, para 127]. Such an approach does not contribute to the future prevention of human rights violations: this judgement did not recognize the state to be guilty in violating its the substantive positive obligations. And it means lack of adequate general legal and regulatory framework for organizing air shows and for air show planning and preparation. Consequently, the state is not obliged to establish strict rules for preparing and holding an airshow, thereby preventing the violation of the right to life (Article 2 of the Convention). In this case, the ECtHR has not sufficiently realized its preventive potential.

*7. **Subsidiarity**.*

The European Court of Human Rights, like almost native courts, implements all the preventive roles but as a subsidiary body in case if national courts fail to prevent a violation of human rights adequately.

Conclusions.

Thus, one of the key goals of the existence and functioning of the European Court of Human Rights as a quasi-judicial institution of a regional system for the protection of human rights is to prevent the violation of human rights. On the effectiveness of the realization of this goal depends further progress of humanity in the gradual reduction of human rights violations.

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SECTION 2.
DIGITAL TECHNOLOGIES, HUMAN RIGHTS AND THE RULE OF LAW CRISIS

KIVALOV S. V.

President of the National University «Odesa Law Academy»,
Doctor of law, Professor, Academician

SILENCING HUMAN RIGHTS IN DIGITAL ERA

Key words: *digital technologies, empowerment, human rights.*

A month ago former UN High Commissioner for Human Rights Zeid Ra'ad al-Hussein being warned about the moral collapse of global leadership has told NY Times that world leaders are weak, shortsighted and mediocre, and no longer willing or able to defend human rights. Abuses used to be called out and stopped, and human rights offenders had something to fear. Today, they are met with silence instead [1].

On the contrary, while economic crisis, mass atrocities, violence, hate speech, acts of terror and armed conflicts harming the whole world with paying minimum attention to them, the silent war against human rights existed without any suggestion up to 2018.

The case is about misuses and abuses of law in information sphere.

Digital technologies interfere all elements of human life: personality, socialization, economic status on different levels of social interaction. Due to that, the less response we pay to human rights abuses in digital sphere, the maximum chance that they will be increasing drastically.

Information is the frontier of civilization development.

It affects judiciary and judicial process too. Artificial Intelligence and Internet of things, mass surveillance and social control, digital technologies in jurisprudence and future legal aid are of great significance to European civilization and the whole world. Every day we are faced upon new challenges in a queue to neutralize imbalance between digital development and legal protection. This May US president has signed an executive order which effectively bars US companies from using foreign telecoms believed to pose national security risks [2].

A GB company Privacy International has won its five-year legal battle with the Investigatory Powers Tribunal (IPT), with the UK Supreme Court ruling that the IPT can be subject to judicial review. The decision guarantees that when the IPT gets the law wrong, its mistakes can be corrected, Privacy International claimed after the Court revealed its decision, adding that it ensures that the UK's "spying tribunal" remains subject to the rule of law [3].

The role of individual empowerment over personal data, and in particular the right to erasure personal information with balance between privacy and freedom of expression when evaluating right to be forgotten claims was the key point of some judgements of ECHR.

Regarding abuse of powers and mass surveillance we knew the position of the Court in «Big Brother watch and others v. the United kingdom» due to which bulk interception and processing of metadata by the State interferes with Article 8 of European Convention as it can «reveal the identities and geographic location of the sender and recipient and the equipment through which the communication was transmitted. In bulk, the degree of intrusion is magnified, since the patterns that will emerge could be capable of painting an intimate picture of a person through the mapping of social networks, location tracking, Internet browsing tracking, mapping of communication patterns, and insight into who a person interacted with that» [4].

Balancing of fundamental rights in digital sphere as usual is a matter of national law, and the ECtHR will give deference to the national balancing as long as it stays within the limits of the ECtHR case law.

To respect, protect and fulfil human rights in the digital environment we should ensure the role and significance of the ECHR case law and its guaranties [5] towards harmonizing European legislation and modern practice.

I have to point that this aim is focused on the position that human rights should be strengthened in digital environment but not polluted.

«Ensuring that human rights are strengthened and not undermined by artificial intelligence is one of the key factors that will define the world we live in», says Council of Europe Commissioner for Human Rights, Dunja Mijatović, in a Recommendation «Unboxing artificial intelligence: 10 steps to protect human rights». It provides a number of steps which national authorities can take to maximize the potential of artificial intelligence systems and prevent or mitigate the negative impact they may have on people's lives and rights. COE headquarters said that this document focuses on 10 key areas of action:

- human rights impact assessment;
- public consultations;
- human rights standards in the private sector;
- information and transparency;
- independent oversight;
- non-discrimination and equality;
- data protection and privacy;
- freedom of expression, freedom of assembly and association, and the right to work;
- access to remedies; and
- the promotion of artificial intelligence literacy [6].

It stresses that Member states should establish a legal framework that sets out a procedure for public authorities to carry out human rights impact assessments on AI systems acquired, developed and/or deployed by those authorities. State use of AI systems should be governed by open procurement standards, applied in a transparently run process, in which all relevant stakeholders are invited to provide input. In order to comply with their positive and procedural obligations under the European Convention on Human Rights, member states should apply such measures as may be necessary to protect the human rights of individuals against violations by AI actors throughout AI systems' entire lifecycle. Member states should specifically ensure that their legislation creates conditions that are conducive to the respect for human rights by AI actors and do not create barriers to effective accountability and remedy for AIrelated human rights violations. Systems that cannot be subjected to appropriate standards of transparency and accountability should not be used. Member states should establish a legislative framework for independent and effective oversight over the human rights compliance of the development, deployment and use of AI systems by public authorities and private entities. This legislative framework may include mechanisms that consist of a combination of administrative, judicial, quasi-judicial and/or parliamentary oversight bodies effectively cooperating with each other. Member states must refrain from using AI systems that discriminate or lead to discriminatory outcomes and, within their jurisdiction, protect individuals from the consequences of use of such AI systems by third parties. The development, training, testing and use of AI systems that rely on the processing of personal data must fully secure a person's right to respect for private and family life under Article 8 of the European Convention on Human Rights, including the «right to a form of informational self-determination» in relation to their data. In the context of their responsibility to respect, protect and fulfil every person's human rights and fundamental freedoms, member states should take into account the full spectrum of international human rights standards that may be engaged by the use of AI. Freedom of assembly and association: Special attention should be paid to the impact the use of AI systems in content moderation can have on the freedom of assembly and association, especially in contexts where these freedoms are difficult to exercise offline. The use of facial recognition technology should be strictly regulated by member states, including through legislation setting out clear limitations for its use, and public transparency to protect the effective exercise of the right to freedom of assembly. Right to work: The potential of AI to accelerate automation and thereby negatively impact the availability of work should be carefully monitored. AI systems must always remain under human control, even in circumstances where machine learning or similar techniques allow for the AI system to make decisions independently of specific human intervention. Member states must establish clear lines of responsibility for human rights violations that may arise at various phases of an AI system lifecycle. Responsibility and accountability for human rights violations that occur in the development, deployment or use of AI Systems must always lie with a natural or legal person, even in cases where the measure violating human rights was not directly ordered by a responsible human commander or operator. The knowledge and understanding of AI should be promoted in government institutions, independent oversight bodies, national human rights structures, the judiciary and law enforcement, and with the general public [7].

Hope that proper analysis of this key areas must be of great interest to practitioners and Academia while finding the proper balance in formatting new paths of jurisprudence in Digital era. Due to overcome these challenges a Faculty of Cybersecurity was created in our structure in order to seize, analyze and prevent future risks of human rights violations.

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TULIAKOV V. O.

Vice-Rector on International Relations, Corresponding Member
of the National Academy of Legal Sciences of Ukraine,
Judge of the European Court of Human Rights ad hoc, LLD, Professor

VIRTUAL IDENTITY AND JURISPRUDENCE

Let sea-discoverers to new worlds have gone,
Let maps to others, worlds on worlds have shown,
Let us possess one world, each hath one, and is one.
John Donne

Key words: *supersystem, human development, metadata, alter ego.*

Since John Donne has written these words in «The Good Morrow», as a proof of new spiritual world formatting, a new era begins three hundred years after. Era of Matrix, era of Digital world, of Information society.

Everything is changed drastically with new technologies, mass surveillance, social networks, AI development towards the path of technological singularity. European politics are aware about its consequences. «Artificial intelligence driven technology is entering more aspects of every individual's life, from smart home appliances to social media applications, and it is increasingly being utilized by public authorities to evaluate people's personality or skills, allocate resources, and otherwise make decisions that can have real and serious consequences for the human rights of individuals. Finding the right balance between technological development and human rights protection is therefore an urgent matter", says Council of Europe Commissioner for Human Rights, Dunja Mijatović, in a Recommendation "Unboxing artificial intelligence: 10 steps to protect human rights» [1].

But personality as the existence of an individual human being. its rights and freedoms is not grown so essentially. From Marx`s view, the essence of personality is a homeostatic holistic ensemble of social relationships. These relationships influenced on human being, its development, social and educational background that forms informational and spiritual matrix.

Specialists note that education and science will be able to effectively develop in networks only through real-world cyber-social anthropocentrism as a methodology, that is, an attentive attitude to the man of the Network as the basic, fundamental system-forming factor of the existence of this new complex and multi-level super-system. It turns out that cyber social development should directly push, fuel social, and vice versa. The above dual structure must be effectively managed in order to preserve the main function of the ambient supersystem – human development. To establish such a developmental system, one also needs a steady, solid, confident attitude to the Intermen (a new personality that has been formed and acts in cyber-sociology since childhood) as a person – an image of the near future, awareness of it as a subject of management and, at the same time, The object of study, which, of course, has a specific ontological, existential nature, with the primacy of the spiritual and intellectual essence over its bodily nature, with its objective physical limitations [2].

The pure fragment of such object is its digital essence and context. A digital personality (virtual identity) is a unique combination of some's name, email, date of birth, photos and texts and, most importantly, social relationships that can be used to adequately represent human real identity in the digital world (in social networks, for registration on sites, in various communication channels such as e-mail and messengers). This identity should be safeguarded in complex with other social relationships that create human being as natural, spiritual, digital and social construct. Radical defense of human being`s digital personality should be done against abuses of power, artificial intelligence, radical secularism, etc.

Network and social clusters and platforms formulate new narratives that differ by state, national and common paradigms. These paradigms of personal and collective safety, security and independence contradict each other on above mentioned levels, generating different understanding of what is the right to life, the right to happiness, the right to be forgotten and the right to be punished in particular as regards to digital personality.

Sometimes the effect of Informational society and networks triggers social anomy and protest against state sovereignty. Principle of legality at metamodern society validates depending more on general values. The ECHR jurisprudence defines the Convention on Human Rights as a «constitutional instrument of the European public order» in the field of human rights. (Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland, § 156 [3]). It is significant that the latest decisions of Taricco II, ECJ 2017 [4], Tsezar and others v. Ukraine, ECHR 2018 [5] demonstrate a shift in focus on the priority of the values of collective actors over individual rights (European and State Values).

From the other point of view tendencies in development of modern ideology and antropocultural shift make possible to discuss how digital personality would be protected as a part of a human being.

Does the erasure of your metadata would affect your health? Is it possible to say about the right to life regarding virtual human or not? What would be the way of progress in formulating of new rules and new practice on International Level? Is it possible to kill intentionally your virtual alter ego? Some criminologists are discussing these ideas [6]. By the way, somebody is discussing the shift regarding Rights of Robots too…

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KARCHEVSKYI M. V.

Lugansk State University of Internal Affairs named after E. O. Didorenko,
First Vice-Rector, Doctor of Law, Professor

LAW AGAINST THE TECHNOLOGICAL «ARMAGEDDON»

Key words: *technology development, legal regulation, mixed justice, justice of artificial intelligence.*

The most radical view of humanity's prospects in the context of technology development is the concept of technological singularity. Its author, V. Vinge, believes that after the emergence of intelligence that surpasses human, the speed of progress will be overwhelming. Mankind will find itself in a «regime that differs from our past no less radically than we, people, themselves are different from the lower animals. Such an event cancels due to the inappropriateness of all human laws, perhaps in an instant. The uncorrected chain reaction will begin to develop exponentially without any hope of restoring control over the situation» [1]. According to V. Vinge, this will either lead to artificial intelligence (AI), or intelligence amplification technology (IA). That is, we can conclude that technological singularity is considered as a general negative final of the two hypotheses we have considered. However, despite the arguments for the inevitability of such a scenario, our analysis of promising problems of law shows that humanity has the ability to maintain control over the situation. By this we mean the solution to effective legal regulation.

We formulate the following provisions regarding the long-term tasks of legal regulation due to the hypothesis of the development of artificial intelligence and the hypothesis of the development of technologies of transhumanism:

1. The development of technologies cannot be prohibited. Despite the risk of dangers, the absolute prohibition of the development of artificial intelligence systems or transhumanist technologies is impossible. Legal regulation in this area should provide incentives for socially effective use of technology and minimization of the risks of technology abuse. A separate task of legal regulation in this context should limit the destructive effects of global corporations.

2. Legal regulation should ensure the maximum diversification of technological decisions. Technology should not be limited, but on the contrary become as diverse as possible. If the right is to create conditions / requirements to create as many different technology solutions as possible, this will effectively prevent the development of negative impacts. For example, known negative scenarios for the implantation epidemic (inflicting harm to mankind due to a violation of the work of all implanted devices) or «black mucus» (destroying planetary biomass by nanobots implementing the program of self-reproduction) will simply be impossible, due to the guaranteed availability of alternative technical solutions.

3. The classical scheme «developer-owner-user» is an urgent and popular among the modern level of technologies. Thus, the Resolution of the European Parliament of February 16, 2017 as for the norms of civil law on robotics offers such mechanisms as the creation of a system for registering robots, a special fund for civil liability insurance, is proportional to the responsibility of developers and owners of robots, depending on the time during which the owner carries out training work, etc. [2]. The complication of technologies will require the transition to a new, more complex, scheme of legal regulation. It is clear that the legal regulation of the socialization of artificial intelligence will go from the consideration of the work as the object of relations to the allocation of his rights, duties and responsibilities. The problem of the legal status of a physical person whose abilities are reinforced with the help of technologies of transhumanism will be required to be solved. Hypothetically, this problem does not seem complicated and can be solved by adding certain aggravating or mitigating circumstances, restrictions on the occupation of certain positions, performance of works, etc.

4. In addition to traditional justice, the emergence of two new species, we will name them the «mixed justice» and «justice of artificial intelligence», whose functioning will provide counteraction to work, which is a threat to social development and stability. The artificial intelligence justice will be based on robots. Such a system will provide a generalization of clear algorithms of experience gained during the existence of traditional justice.

It is clear that copying the human justice system for artificial intelligence does not make sense. Fundamentally different physical characteristics and needs require a priori to refuse such an approach. However, the creation of this system is a prerequisite for providing humanity with the opportunity to control the development of social processes. Most likely, the justice of artificial intelligence will be created on the basis of robots. Physical and intellectual data of a person will not be obviously enough for the effective functioning of this justice system. Creating such a system involves a synthesis of clear algorithms of experience gained during the existence of traditional justice. Such a generalization should become one of the main areas of modern legal science. It is noteworthy that already there are Legaltech projects within which AI study current legal practice [6]. However, the task of creating a copy of the existing practice in the field of traditional justice is not enough to ensure the justice of robots, but the experience gained by humanity in the field of justice is an extremely important source of information for ensuring legal regulation of the work of robots.

It is worth noting that the thesis on the use of the experience of traditional justice, together with the inappropriateness of creating its computerized copy, is receiving an interesting confirmation today. There is a debate on introducing criminal risk assessment algorithms. The latter are already used by some courts for making decisions on determining the type of punishment, the feasibility of staying in prison, the severity of the ages. Theoretically, this reduces bias because judges make decisions based on data processing, rather than on their own, possibly subjective beliefs. This raises an extremely important issue. Because the algorithm's base is an earlier decision, it (the algorithm) can amplify and perpetuate the bias, generate even more biased data for further cycles of even more biased solutions [3]. For example, if before a judge a person with a low income, the algorithm is very likely to advise to imprison the court. The next time in a similar situation, the algorithm will be even more categorical, the next – more and more ... Obviously, the solution to the problem is not in copying or constructing a computer remake of the traditional case-law approach to traditional justice. Promising here is the expansion of the number of arguments used by the court. The use of technologies of artificial intelligence and large data can bring the classical legal requirements for the objectivity, completeness and comprehensiveness of the trial to a fundamentally new level [4].

A suitable example with American military catapults will be appropriate here. At the beginning of the era, jet engine seat pilots developed on the basis of average pilots. After qualitative change in speed, the catapult, precisely because of this approach to development, became deadly. Eliminating the error became possible only after gathering a large amount of information. All pilots were checked for compliance with the average size laid down in the calculations of the catapult. It turned out that a pilot that would match all the significant for catapult sizes does not exist. Moreover, one of the main conclusions of the study was as follows: any system designed for the average person is doomed to failure [5]. This example is an extremely illustrative illustration of the problem of the effectiveness of punishment. Continue the analogy. Crime is an accident. By using the law, we try to pull a person out of a social peak. However, because of the consideration of all people as average, a specific person to whom the criminal-law «catapult» is applied is likely to suffer such «damages» that will exclude the possibility of its return to normal social existence.

Engineers have solved the task of collecting a large amount of data, analyzing them and leaving the cabin the same for everyone, the technologies of individual settings have been introduced. Continuing the analogy one can assume that the solution and such an eternal problem of criminal legal regulation as an appointment of effective punishment can also be found using Big Data. The collection and analysis of as much data as possible on punishments, psychometric characteristics of criminals, peculiarities of their post-criminal behavior, etc., can radically change the situation.

5. Ensuring legal safeguards for the implementation of morphological and reproductive freedom through a balance between the exercise of the right of a particular person and the need to ensure overall security, stability and development.

6. Resolution of the question of the limits of criminal law regulation in the field of biogenetic and cognitive problems, socially dangerous violations of morphological or reproductive freedom, as well as violations of the requirements of diversification of technological decisions.

7. Since monitoring the development and use of certain technologies will require an effective monitoring system, the analysis of legally relevant information will become much more complex and will require fundamentally new professional competencies. The traditional division of tasks between

lawyers and specialists will be extremely ineffective. There will be convergence of legal and technical sciences. A solution to the question of defining and developing new types of legal professions will be required. In this context, the wording of new laws should be made technologically neutral. It is the approach that will ensure the necessary stability of legal regulation in the conditions of rapid changes in technological reality.

8. The significance of the global problem becomes a matter of legal safeguards for the effective development of the information environment. Huge amounts of information accumulated by humanity in the process of life will obviously require new legal mechanisms. Existing rights to ownership of information and intellectual property rights are likely to be supplemented by new institutions resembling the right to use subsoil and the right to archaeological activity. The complex of these issues should be considered as the establishment of a coordinate system for the future legal assessment of both artificial intelligence and technologically advanced people, since it is precisely in this area that the overwhelming part of their socially significant activity will take place.

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SAVINOVA N. A.

National University «Odesa Maritime Academy»,
Dean of the Faculty of Maritime Law and Management, Doctor of Law

TWO EPISODES OF CRIMINAL JUSTICE OF THE FUTURE: A FUTURISTIC FORECAST

Key words: *futuristic forecast, criminal justice, BigData, principle of justice.*

Digitalization, development of Internet of Things (IoT) and the use of Artificial intelligence (AI), it would seem that these provide us in prospect mechanisms for eliminating the human factor from making such serious decisions as criminal justice. It seems that all of us are often visited by the idea that the hour is not far when living judges will be replaced by electronic analogs that can take into account not only evidence, but also the whole range of nuances that accompany sentencing in criminal prosecution cases.

However, what does this perspective conceal taking in the account the approaching decision-making opportunities based on Big Data and transition of justice, and especially (!) Criminal justice, «into the hands» of AI? Consider only two obvious prospects for criminal justice in the case of using BigData in the Post-truth conditions to determine the phenomenon of «Justice» (Episode 1), and in the case of passing decision-making opportunities about criminal prosecution from person to AI (Episode 2).

Episode 1: Justice and objectivity of Big Data. Of course, the onset of the Information Age has already become Higgs boson both for the reformatting of jurisprudence in general, and criminal justice, in particular. The universality and unity of understanding of the principle of justice, which underlies the social dynamics of the attitude to criminal law regulation, in theory, can and should lead to an understanding of the unity of the principles of crime and punishability by all judges. However, how can it be formed, taking into account the new forms of objectification of public opinion?

It must be assumed, but the principle of justice can be formed, and it is possible that this will happen in the near future, based on the analysis of BigData, which in turn based on the data of social networks and activity ratings of the TV audience. Elementary studies of public reactions to e or other personal or socially significant events, published court decisions and interpretations of such decisions can serve as attractors of emotional reactions and value judgments in the understanding of the principle of justice by society.

What are the threats concealed in this situation? In terms of Post-truth, the prospect of using Big Data does not promise anything positive from the point of view of a professional assessment of the phenomenon of justice, insofar as an objective analysis of the data does not involve studying the opinions of only professional audiences such as lawyers and philosophers. The validity of such studies suggests an assessment of the phenomenon of justice by people endowed with emotions regarding personal situations of injustice, which will often be much more radical than the attitude to such a definition by professionals.

If the principle of the Rule of Law, until a certain time, will be able to keep within the framework of professional assessments, that the principle of justice today goes into the sphere of assessments by people: it is the contradiction of the natural-legal attitudes of society regarding the fairness of treatment with criminals and victims of crime, it acts as a trigger for individual and group deprivations. It is important to note that, as experience in recent decades shows, the level of such deprivations varies in the spectrum, from single acts of aggression against criminals or «unfair» judges to mainstream of oppositions of the government and population at the state level.

Consequently, the use of Big Data in determining justice is very doubtful, insofar as it will contain not a definition, but accompanying emotions determing the subjective reaction of people to injustice.

Episode 2: Everything that you feel … will be used. By whom? Modern futurology, based on the analysis of the features and trends of the development of information technologies and new technologies in the field of biology and genetics defined by the 21st century (Yuval Noah Harari. «Homo Deus: A Brief History of Tomorrow», 2014/2016), suggests the possibility of obtaining AI of complete control over the human emotional sphere .

It is not a secret that already today an elementary psychological analysis of an account in a social network makes it possible to build a relatively correct psychological portrait of a person based on his neurotic complexes. Do we take into account the whole spectrum of «voluntarily» and «forcibly» data collected from us? These are databases of addresses, telephones, biomaterial for analyzes and photos for passports, locations (marks in ATMs and shops, gadget signals), photographing when approaching ATMs, and in the near future retina of eyes will be engaged when using it as a key. Here it is worth adding your step data from gadget repositories and pulse rate data from ID bracelets.

For now, for us, these are just Data sets … In fact, these scattered data can be analyzed by an individual or a group of specialists for one purpose or another. Combining these data and comparing them is painstaking work today, which, in fact, is beyond the power of a person, because it contains a lot of data necessary for combining and comparing to one or another second response of investigated person.

The development of AI and the interpretation of human DNA gives the completely different meaning of the totality of the above Data sets: in seconds, you can get a complete biopsychic portrait of a person by matching the biochemical reaction to the events embedded in the DNA by comparing the body's response and / or facial expression and body pose with mental manifestations in certain locations, certain similar / identical situations.

Imagining the role of a judge with the possession of such possibilities of using data not of a person, but of AI, it is easy to see very apocalyptic consequences: the identity of the defendant, in fact, like the victim, loses meaning as such – punishment will be imposed to an organism subordinate to the biochemical reaction of neural complexes acting in conditions created by the same biological organisms and environmental factors.

Can we say anything about guilt under these conditions, about the expediency of punishment? And the main question: what is the role of justice in general in case of a similar development of events?

Instead of the conclusion. The above assumptions are paradoxical as far as fantastic for people (just!) Of the beginning of the twentieth century: stories that a person's face can be seen and a voice heard simultaneously from millions of plastic boxes. Yes, and for us not so long ago, for example, evaluating the nominal capital of bloggers (the number of likes and subscriptions) as a selection criterion for participating in the lists of political parties could seem like a surrealistic fantasy. However, this is only an illustration of the seriousness of the estimates made by the report, for the possible prevention of scenarios of the development of criminal justice in the future that are dangerous for human development.

Only an awareness of the risks on the example of these two episodes already confronts us with a choice:

1) Understand such risks of development and make a rational decision and unify in advance all levels of justice in the criminal law system, relying on the unification of professional assessments and interpretations of legally significant phenomena and concepts, such as justice, humanism, humanity and value systems to be protected from non-professional assessments influenced by Post-truth. Such an approach may somewhat soften and "humanize" the potential transfer of justice to AI, which is quite likely.

2) Refuse to accept such prospects and ensure the impossibility of transferring justice to the area of activity of AI. Of course, such decisions must have the United Nations Millennium Declaration level, insofar as it is the content of many of the provisions of this declaration and the Okinawa Charter on Global Information Society (2000) that will have to be resisted. However, even here one should clearly assume the determining of spheres (mechanisms, separate components of the justice system) into which IoT can be used, insofar as its correct use taking into account Big Data's professional selection, it is the Internet of Things that can facilitate modern use by courts of all levels of the full range of information not only about the evidence base, but also about the order of the investigation, court hearing, socially important conditions of the crime and the administration of justice on previous instances.

The report conclusions are fully applicable to justice in general. Criminal justice, in this case, serves only as a demonstrator of the possibilities of the deformation of justice in the future that will be the most painful for humanity and humanity.

KHARYTONOV EU. O.

National University «Odesa Law Academy»,
Head of the Department of Civil Law, Corresponding Member
of the National Academy of Legal Sciences of Ukraine, Doctor of Law, Professor

KHARYTONOVA H. I.

National University «Odesa Law Academy»,
Head of the Department of Intellectual Property and Corporate Law,
Corresponding Member of the National Academy of Legal Sciences of Ukraine,
Doctor of Law, Professor

TOLMACHEVSKA YU. O.

National University «Odesa Law Academy»,
Master of Law

DIGITAL TECHNOLOGIES AS A THREAT OF HUMAN RIGHTS: PREVENTION OF THE RULE OF LAW CRISIS

The article covers digital technology as a symbol of the transition from the old to the new way of society. The authors claim that the growth of the influence of international information corporations, which actually acquires executive power, is dangerous. So it is about the need to overcome the legal vacuum that has emerged in the field of digital technology. It is concluded that the legal support of the IT-sphere should be through the use of legal means (the formation of IT-law, IT-legislation, etc.), as well as organizational efforts of state authorities and public institutions (interactive civil society).

Key words: *digital technologies, IT-law, human rights, the rule of law, social networks, democracy.*

The widespread use of digital technologies in modern society caused the emergence of the danger of violation of human rights, related to the possibility of influencing through social networks for the formation of public consciousness, manipulation of it in order to achieve political goals, violation of privacy, etc.

Note, that it was possible to read about the change of technology and the paradigm in general, about the work with the masses a decade ago. It was written about the Arab Spring, when the opposition's actions were coordinated in social online networks, then about Trump, who won exclusively with the help of Twitter, and now it is a question of the «revolutionary» methods of Zelensky's team that translated campaigning into the network [1]. It promotes e-voting, conducting referenda through networks, etc., which may lead to threats of violation of political and other human rights.

In our opinion, in the digital age, the threats mentioned are intensified by the so-called «democratic pendulum». The essence of the latter is that in one period people are ready to sacrifice their welfare for the sake of «higher goals», in another – to sacrifice «higher goals» for social justice. When «higher goals» are protected, then people begin to worry about their social insecurity. But when, on the contrary, their basic social needs are secured, then the focus is on ensuring freedom and quality of life. Democracy is intended to ensure that each group of these interests has the right to vote. Such fluctuations are not a defect in democracy … it is a sign of nature in general [2].

In these circumstances, autocratic manipulative means of influence on society through social online networks, taking into account the large audience covered by these networks, the accumulation of huge information databases by information groups not only about their users, but also on a wide range of others, the speed of collecting, disseminating and the transmission of information has an advantage over traditional democracy and market economy. There is a danger that democracies that are slower than autocracy, because they emerge from the freedom and dignity of the individual, the need for human rights, the balance of interests of members of society, in this competition will be in loser.

The growth of the influence of international information corporations, which actually acquires executive power, is dangerous. This power is not legitimate by laws. Therefore, algorithms transform our lives into «Black Box». The possibility of manipulation grows dramatically. Instead, the autonomy of the individual, as the foundation of freedom, is threatened [3, p. 36].

Digital technology is a symbol of the transition from the old to the new way of society. Therefore, it is fair to think of Charles Keindleberger that the transition from the old to the new order often results in a lack of rules and institutions that entails an increased risk of uncontrollable conflicts due to the destruction of confidence [4, p. 373].

So it is about the need to overcome the legal vacuum that has emerged in the field of digital technology.

To solve this problem, the government, as a mechanism for organizing the life of this society, must implement a number of measures within the legal field. Thus, there is an «objectification» of these phenomena (in particular, subjective rights), their transition from an abstract civilization to the level of values of society, legal constructs, and categories, institutions of the state.

Significant efforts are required from the government to introduce certain civilizational phenomena, ideology, concepts, etc. into society. These include the creation of «IT-law», which is formed as a symbiosis of virtual and real reality, reflecting attempts to introduce IT in the usual legal field, virtual in nature.

The effort should be made not only by the government, but also by society, since without it the process is slowing down, and sometimes it becomes impossible at all. Such a condition is not obligatory, but in cases when the state imposes values that are contrary to its mentality and the natural way of evolution, the probability of a reversal of the process exists. Therefore, the legal provision of the IT-sphere cannot be reduced to the publication of normative acts but requires the adoption of a number of organizational measures.

Since the activity of the government is only one of the means of legal support, we must distinguish between governmental and non-governmental (public) legal support.

The activity of the government on the legal provision of IT-sphere should be carried out in ways:

1) methodological, doctrinal and ideological support (development of the concept, principles of legal support, etc., support of the doctrine of law in this field, creation of a world-view basis, etc.);

2) legislative provision (issuing legislative acts, authorizing legal practices and standards of morality in the field of IT-relations);

3) ensuring the proper implementation of the rules of the legislation concerning the IT sphere, with the help of the relevant state institutions, the judicial system;

4) information and advocacy (explanation of the essence of the provisions being implemented, implementation, etc., legal education in the IT-sphere);

5) organizational support (creation of appropriate institutions).

Thus, the legal support of the IT-sphere should be through the use of legal means (the formation of IT-law, IT-legislation, etc.), as well as organizational efforts of state authorities and public institutions (interactive civil society).

The paradox lies in the fact that in the conditions of the digital revolution, public-law protection requires, first and foremost, the interests of individuals in the private sphere. This is explained by the fact that democracy, which by its very nature is slower than autocracy because they derive from the freedom and dignity of the individual, in this competition is structurally in loser. As George Soros has pointed out, autocratic countries combined with monopolies of the platform and the ability to create collective values of individual data can have an edge over democracies. If capitalism of data is really better suited to autocracies than democracies, then along with the latter, there is also a social market economy under threat, and with it a legal state. As George Soros has pointed out, autocratic states combined with platform monopolies and the ability to create collective values of individual data can have an edge over democracies. If capitalism of data is really better suited to autocracies than democracies, then along with the last one, there is also a social market economy which is under threat, and with it a constitutional state. Totalitarian regimes can use new technological possibilities more consistently, narrowing (or blurring) the existing ethical limits.

Therefore, it seems right to think that democracy and a market economy should show that they are better than autocratic state capitalism in the digital age. To do this, they must create conditions for the protection of individual autonomy and competition in the digital market economy. The protection of truth, competition, and welfare in the digital age are becoming a matter of survival of liberal democracy and a social market economy [3, p. 36-37].

The achievement of this goal is possible only through the active use of the mechanism of private law and public-law regulation of the corresponding relations in the field of human rights protection in order to ensure, ultimately, the rule of law in this area.

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ZAHORODNII V. E.

National University «Odesa Law Academy»,
Rector, PhD in Law, Associate Professor

TISHCHENKO V. V.

National University «Odesa Law Academy»,
Head of the Department of Forensic Science, Corresponding Member of the National Academy of Legal Sciences of Ukraine, Doctor of Law, Professor

DYNTU V. A.

National University «Odesa Law Academy»,
Associate Professor at the Department of Forensic Science, PhD in Law

THE ESTABLISHMENT OF CRYPTOCURRENCY

Key words: *Cryptocurrency, virtual currency, digital economy, Bitcoin.*

The process of establishing cryptocurrency as a mean of payment for current digital economy is described in the article. Moreover, the distinction between virtual currency and electronic money is scrutinized.

Currently because of «The Forth Industrial Revolution» [1, p. 35] and «rapid development of IT technologies the framework of economy was changed and caused the emergence of new phenomena – digital economy, which can be considered, as a series of economic, social and cultural activities that are performed online and are related to the use of information and communication technology» [2]. Thus, the digitalization of the economy has set up the boundless environment with renewed trading rules. Furthermore, it triggers the creation of the virtualization of the world bank system – a transformation of banking on the base of informational technology implementation into bank sector; according to the form it is a transition of bank sector into electronic flatness of utilization which can be seen in following forms: electronic banking, electronic payment systems (domestic and international) [3].

Consequently, the high-speed rise of digital trade market and virtualization of the world bank system demanded the creation of the certain financial tool which can be used via the Internet and ensured the high speed of transactions. Such kind of instrument has become virtual currency [4].

Virtual currency is different than electronic money which is a digital means of fiat currency and is utilized for electronic transfer of reflecting fiat currency cost and is considered as a legal means of payment [5]. Furthermore, the distinction between virtual currency and other means of payment is the method of the emission of payment units and the organization of their storage and transfers system.

In addition, «unlike gold or silver virtual currencies have no non-monetary use or value – they are just bits of data» [6]. Furthermore, the value of virtual currencies is based on the convention among system's users which are working via the Internet [7].

According to the European Central Bank position which was expressed in «Virtual currency schemes – a further analysis» «virtual currency is a digital representation of value, not issued by a central bank, credit institution or e-money institution, which, in some circumstances, can be used as an alternative to money» [8]. Moreover, in report of the Financial Action Task Force virtual currency is considered as a «digital representation of value that can be digitally traded and functions as (1) a medium of exchange; and/or (2) a unit of account; and/or (3) a store of value, but does not have legal tender status (i.e., when tendered to a creditor, is a valid and legal offer of payment) in any jurisdiction. It is not issued or guaranteed by any jurisdiction and fulfills the above functions only by agreement within the community of users of the virtual currency» [9].

Very often the creation of cryptocurrency correlates with the replication to the social demand for a currency independent from banking and governmental institutions, after economic crises in 2008 when they lost their reliability.

However, the idea of private money is not new, it was articulated in the book of Austrian economist Friedrich August von Hayek «The Denationalization of money». His main idea was that government should be deprived of the money's emission monopoly with a target to prevent the inflation process [10]. Furthermore, Milton Friedman in 1999 during the interview admitted, that «…the Internet is going to be one of the major forces for reducing the role of government. The one thing that's missing, but that will soon be developed, is a reliable e-cash, a method whereby on the Internet you can transfer funds from A to B without A knowing B or B knowing A, the way I can take a USD 20 bill and hand it over to you and then there is no record of where it came from» [6]. His prediction was precision because progressive instruments and systems are establishing neoteric paradigms for transactions and new channels of capital [11].

It should be noticed, that the roots of cryptocurrency go to the end of previous century, in particular 1983 David Chaum offered the idea of combining transparency and anonymity of transaction for all users by utilizing «Blind signature» [12].

Then in 1990th was formed the movement of cryptoanarchists – cypherpunk whose idea was the usage of cryptography and other similar tools for changing social order. In 1993 one of the founder of the cypherpunk Eric Hughes announced the confidentiality of transactions by using multi-step encryption and published.

In 1994 Timothy C. May published the work «The Cyphernomicon: Cypherpunks FAQ and More, Version 0.666» where he described safe untraceable encrypted transactions, which would use the P2P system which does not need verification by third parties and would cause the independent from the government [13].

In 1998 Wei Dai offered cryptocurrency «b-money». He wrote «I am fascinated by Tim May's crypto-anarchy. Unlike the communities traditionally associated with the word «anarchy», in a crypto-anarchy the government is not temporarily destroyed but permanently forbidden and permanently unnecessary. It's a community where the threat of violence is impotent because violence is impossible, and violence is impossible because its participants cannot be linked to their true names or physical locations» [14].

In 2005 Nick Szabo was created «Bitgold». As a libertarian wing of cypherpunk inspired by the novel of Ayn Rand «Atlas Shrugged» he wanted to create «Galt's Gorge» in the cyberspace – free trade zone. Firstly he came to idea of creation smart-contracts which was based on blockchain system in 1990th, and later on invented cryptocurrency.

Currently, the most popular cryptocurrency which is used by bidirectional flow is Bitcoin. Bitcoin is decentralized P2P (Person to Person) payment network, which serves its users without central bodies and agents. From the users' point of view, Bitcoin is analog of cash but only for the Internet (In Bitcoin information site). The maximum amount of Bitcoin I the world is restricted and cannot be more than 21 million.

The creation of Bitcoin is correlated with the name of Satoshi Nakamoto, who on September 3, 2009, via the Internet published an article «Bitcoin: A Peer-to-Peer Electronic Cash System» [15], in which he described the main principals of new cryptocurrency. The main characteristics which distinguish Bitcoin from traditional electronic money and cashless settlements that Bitcoin is not debt obligations of the issuer.

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ANDREICHENKO S. S.

International Humanitarian University,
Professor of the Department of International and European Law,
Doctor of Law, Associate Professor

THE ROLE OF THE EUROPEAN COURT'S PRACTICE IN PROTECTION OF THE RIGHT TO RESPECT OF PRIVATE AND FAMILY LIFE DURING THE ERA OF DIGITAL TECHNOLOGIES

Key words: *human rights, right to respect of private and family life, European Court of Human Rights, the information society.*

Does digital technology offer us fresh hope for the realization of human rights – or the Game is Over? Everyone is aware of the immense benefits that our digital era delivers in just about every area of life. Human rights perspective is not an exception. Social media and tools such as encrypted communications help to connect and grow the movements of human rights defenders. Human rights officers can gather information from social media sources, in addition to enhancing or supplementing human rights investigations by using satellite imagery and encrypted communications to ensure better monitoring, investigation and analysis. A wide range of applications have been developed to assist investigators to verify that the information they gather is genuine and accurate. Other digital tools help investigators identify patterns within their data that can be matched with other, open-source information sets. Digital tools can also help us with early warning. Spikes of hate speech and other online indicators of rising tensions can constitute a significant alert to impending violence. Human rights employees are not just using digital tools to detect violations: they are also employing that knowledge to prevent further violations. So, to this extent – and in many more ways – digital tools are our friends and allies in upholding people's rights [1].

At the same time, it becomes obvious that the rapid development of the digital sphere has negative aspects. The use of modern digital technologies by states may involve violation of the fundamental values of a democratic society, and in particular the right to respect of private and family life.

The problem of ensuring the right to respect of private and family life has received considerable attention in the European system of the human rights protection. It goes without saying that the core of this system is the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) (1950), in conjunction with a specially created and unique monitoring mechanism in the form of the European Court of Human Rights (ECHR). The right of individuals to apply to the ECHR is fairly considered as the cornerstone of the international system for the protection of human rights. Therefore, the analysis of the practice of the ECHR regarding the violation of Article 8 of the Convention in the context of the use of new information technologies is of great importance.

Article 8 declares that, everyone has the right to respect for his private and family life, his home and his correspondence. Moreover, there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others [2].

Here is an example from the recent ECHR practice in relation to Article 8 in the context of the use of digital data.

The case *«Benedik v. Slovenia»* (April 24, 2018) concerned the Slovenian police's failure to obtain a court order to access subscriber information associated with a dynamic IP address recorded by the Swiss law-enforcement authorities during their monitoring of users of a certain file-sharing network. This led to the applicant being identified after he had shared files over the network, including child pornography [3].

The applicant complained that his right to privacy had been breached because the Internet service provider (hereinafter «the ISP») had retained his alleged personal data unlawfully and the police had obtained subscriber data associated with his dynamic IP address and consequently his identity arbitrarily, without a court order, in breach of Article 8 of the Convention [4, para 73].

The Court reiterates that private life is a broad term not susceptible to exhaustive definition. Article 8 protects, inter alia, the right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of «private life» (see Uzun v. Germany, no. 35623/05, § 43, ECHR 2010-VI (extracts)) [4, para 119].

The Court concludes that the applicant's interest in having his identity with respect to his online activity protected falls with the scope of the notion of «private life» and that Article 8 is therefore applicable to this complaint [4, para 142].

The Court found in particular that the legal provision used by the police to obtain the subscriber information associated with the dynamic IP address had not met the Convention standard of being «in accordance with the law». The provision had lacked clarity, offered virtually no protection from arbitrary interference, had no safeguards against abuse and no independent supervision of the police powers involved. The Court holds, by six votes to one, that there has been a violation of Article 8 of the Convention.

In the case «K.U. v Finland» (2008) [5], concerns the use of criminal law in the protection of privacy, the ECHR found that the positive obligations of the Contracting States to ensure the protection of private life entailed an obligation to provide law enforcement agencies with the ability to obtain access to dynamic IP addresses and communication data in order to identify a private person who has violated another individual's right to private life. The ECHR judgment in K.U. v Finland contributes to the definition of the balance between the freedom and confidentiality of communications and anonymity over the internet, and the requirements of privacy and limitations of anonymity and confidentiality of communications [6].

It should be emphasized that the Court found a positive obligation under Article 8 of the Convention, which was formulated as a negative obligation. International human rights law clearly establishes the responsibility of states for the protection, promotion and respect of human rights. This responsibility exists not only when the state directly violates human rights, but also when the state is not able to protect persons under its jurisdiction from such violation.

The European Court of Human Rights very often uses the notion of a positive obligation. The Court in its case-law has slated that States parties to the Convention must adopt measures necessary to protect human rights and freedoms specified by the ECHR with respect to both actions of a State and that of private persons and entities [7, p. 12].

Examples of the first «fundamental» cases concerning positive obligations under Art. 8 were Marckx v. Belgium (1979), X. and Y. v. Netherlands (1985) [8]. That being said, in the case of X. and Y. v. the Court recalled that although the purpose of Article 8 is mainly to protect the individual from arbitrary interference by the state, it does not simply oblige the state to refrain from such interference: this negative commitment may be supplemented by positive commitments, inalienable from true respect to private or family life. These obligations may include taking measures aimed at ensuring respect for private life even in the field of relations between individuals (para 23).

By determining whether a positive commitment exists, should be established balance between the interests of the entire society and the interests of individuals; the search for this balance is the purpose of the entire Convention.

Thus, states are obliged to respect and protect rights. They must not only refrain from violations through their agents and apparatus, but also make sure that the rights are not abused by other subjects. This requirement for the protection of human rights in a broader sense, of course, includes the obligation to prevent non-state subjects from violating human rights, although this obligation may be difficult to define and apply in practice.

In general, the practice of the ECHR in the use of information technologies demonstrates the application of traditional principles by the European Court such as: proportionality, proportionality of restrictions, respect for the balance of interests in the assessment of legislative measures and law enforcement practice. However, the expansion of intervention in the private life of a person by means of new state-of-the-art technologies indicates the need to develop new guarantees for the observance of human rights in the information society.

If humanity strives to fulfill the plan outlined in the Sustainable Development Agenda until 2030 and create a safer, more stable, fair and prosperous world for all, everyone needs to support human rights in all areas, including digital.

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KHARITONOVA T. E.

National University «Odesa Law Academy»,
Head of the Department of Agrarian, Land and Environmental Law,
Doctor of Law, Associate Professor

PAVLYHA A. V.

National University «Odesa Law Academy»,
Student of the Faculty of Civil and Economic Justice

USE OF DRONES IN UKRAINE AS A METHOD OF DIGITALIZATION IN AGRICULTURE SECTOR

Key words: *agriculture sector, dronization, drones, digitalization.*

Until recently, agriculture was the most traditional economic sector. Any innovations here have taken root quite slowly. The development of modern technology forever changes our perceptions of the agricultural sector. The most important technological phenomenon of modern times was the dronization of agriculture.

In Ukraine, as in the whole world, the most active use of unmanned technologies is the agrarian sector. The introduction of drones in agriculture solves a number of problems, for example, such as: monitoring of farmland for the presence of floodplains of the territory, control of uniformity of sowing, yield forecast, crop pest control, fertilizer spraying, irrigation, etc. The decision of all the above-mentioned problems has led to the appearance of such a term as – precision agriculture. Exact farming allows you to exploit the agrarian sector with maximum efficiency for its owner.

Drones are used in agriculture for a variety of purposes. The most popular ones are:

1) Creation of crop maps is the main and first task of the copters. The quadcopter's flight makes it possible to create high-precision maps, which determine the boundaries of fields, which quite often diverge from cadastral data. So, based on this data, it's easier to plan a sowing campaign, taking into account the features of the area.

2) Drones can also be used for planting seed material. All that the farmer needs is a few batteries, as well as special capsules with seeds. This type of seeding will significantly save time and money for any farmer who wants to hire special equipment and personnel.

3) Another important function is irrigation and the introduction of plant protection products; however, special agricultural models of an unmanned aerial vehicle (UAV), equipped with special liquid-reservoirs, will be needed for this. Such drums spray water or chemical preparations more often than the traditional method, in addition, they are able to control the amount of application. Again, saving time and money.

4) The control of the state of crops can also be carried out during the entire season. Such flights can be done once in each phase of plant development, this will be quite enough. With the help of special drone gauges, during the formation of the map, you can see the problem areas of the field, which require a specialist's departure. All other crops that are within the norm do not require additional control.

However, these methods of using UAVs are not limited. They are also used in horticulture, livestock breeding, the shooting of commercials for agrarian enterprises, etc. It all depends on what kind of drone and what is needed for a particular farm.

The use of drones without automation would result in fewer efficiency gains in the industries used because manual management immediately understands human-factor mistakes that would reduce the efficiency of the tasks. Therefore, when applying drones, one can draw a relationship between the efficiency of a drone, that is, its significance and its automation system. The automation system is more qualitative, more stable and more precise, thus becoming more effective in using drones. The second important step will be taking pictures of fields in infrared mode. It shows the so-called "thermal picture" of plants – the degree of heating and reflection of thermal radiation.

The fact is that such an image allows us to assess the state of plants before they can see the visual changes that will fix the "traditional" photo or video camera. For example lack of moisture in the stems and leaves, defeat by pests or diseases, deficiency of the required trace elements. Thus, an agronomist can begin to solve this problem even before it affects the appearance of the plant [1].

Drone (UAV) has long been an excellent solution in the agro-industrial complex. According to the European Agricultural Technical Association, depending on the manufacturer, model, and generation of the device, on average, unmanned aerial vehicles can cover up to 12 square meters. km of fields in less than 50 minutes, rising to a height of 50-100 m. In this case, the accuracy of the image that removes the drill can vary up to several centimeters per pixel. For comparison, satellite images are made only once a week or even a month, and their quality often depends on weather conditions [2]. Also, the most up-to-date and innovative in this area, on May 23, 2019, iForum in Kiev is a test version of a plane drones from the Ukrainian company Abris with the possibility of vertical take-off. This, in turn, will provide even more accurate photography, since its range of software-controlled activities covers 120 km (60 km in one direction and 60 km in the other), and the lifting height reaches 3 km.

As to the advantages of using drones, one can distinguish the following:

1) Save time. The drone can sow 10 square meters in three hours. km of forest seed, while a person needs this day for this. Also, the drone transmits multispectral crop images to a special program on a computer that analyzes the situation and detects problems. A person will go somewhere a day, and the drone will be able to analyze it in an hour;

2) Save staff. Agricultural companies lack personnel, especially in landing and harvesting seasons, while drone workers can work around the clock;

3) Involvement of young specialists in the agricultural sector. Since the younger generation reluctantly goes to the village, and on the contrary only leaves it, there is a likelihood that with the advent of new technologies the interest and prestige of this industry will increase;

4) Nature protection. For example, in Indonesia, dragons are used as an economically efficient way to monitor orangutan populations, which is reduced by monitoring the deforestation [3].

However, the use of drones is not without flaws, because it is a rather costly process. In the coming years, it will be possible to start a farmer's drone, only large and developed companies – others, unfortunately, the new technology will not yet be on the pocket. Also, a significant drawback will be the imperfection of its work during rain, strong wind, hail, low temperature, as there is still no reliable protection of drones from this, which greatly limits the possibility of exploiting unmanned mechanisms.

Thus, the use of drones in Ukraine gives a serious impetus to the development of the agro-sector and brings it to a new level. Today, Ukrainian companies and startups are trying to apply the latest technologies in the agro-industry, reducing costs and increasing efficiency, yields by drones.

The good news is that domestic developments go to the foreign market, which in turn lures new investors for further development and economic development in Ukraine.

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DYKYI O. V.

National University «Odesa Law Academy»,
Acting Dean of Faculty of Cybersecurity and Information Technologies,
PhD in Law

THE SPECIFICITY OF MONEY LAUNDERING WITH THE USE OF CRYPTOCURRENCIES: THE UKRAINIAN EXPERIENCE

The target of the article is to study the place of the cryptocurrencies in the process of money laundering. The subject of the article is to investigate the ways and means of the use of cryptocurrencies for money laundering.

Key words: *cryptocurrencies, money laundering, criminal investigation.*

In today's world, the threat of cyber security is becoming more and more complex, as computer systems are becoming increasingly interdependent, and the number of cyber attacks has grown up steadily. This necessitates the development and improvement of mechanisms and means of effective counteraction to new challenges. So, some countries have developed a new or adapted (criminal) legislation after the signing and ratification of international agreements such as the Cybercrime Convention (2001) [5], while other countries have joined forces and have developed regional platforms such as the European Cybercrime Centre, which began working in 2013, and aims to strengthen the cross-border cooperation and exchange of information.

One of the latest inventions in the world over the past decades was the creation of cryptocurrencies, which are already quite actively used. However, in addition to the positive sides, there are still negative ones, for example, the legalization of proceeds from crime through the use of cryptocurrencies.

It is noteworthy that there are no legislative norms that determine the legal status of cryptology in Ukraine. In addition, according to Article 32 of the Law of Ukraine «On the National Bank of Ukraine», the monetary unit of Ukraine is the hryvnia. The issue and circulation of other monetary units and the use of money substitutes as payment instruments in the territory of Ukraine are prohibited [4]. Also, in its letter No. 29-208/72889 of 8 December 2014, the National Bank of Ukraine determined that the issuance of the Bitcoin currency has no security and legally binding on persons, is not controlled by the state authorities of any country. The National Bank of Ukraine also emphasizes that authorized banks have no legal grounds for enrolling foreign currency received from the sale of bitcoins abroad and warns individuals and legal entities against the use of this currency. The National Bank of Ukraine is also guided by the fact that the European Banking Authority has urged EU banks to refrain from operations with cryptovolumes, including bitcoins, until a system of rules is created that can prevent potential abuse [1].

However, in a letter No. 40-0006/16290 dated 22 March 2018, the National Bank of Ukraine canceled a preliminary document recognizing Bitcoin as a money surrogate. On the one hand, this is a positive step, since it reflects global trends, for example, in the ruling of the European Union Justice Court (Fifth Chamber) of 22 October 2015 in the case of Hedwick v. Sweden, it was stated that cryptography can not be characterized as «Tangible property» within the meaning of Article 14 of the VAT Directive, taking into account that the virtual currency has no other purpose than being a payment instrument [2]. On the other hand, it returns the legal status of the cryptology in its original position of uncertainty. Therefore, research on this issue remains relevant.

In turn, it is possible not only freely exchange cryptology for local or foreign currency in many countries of the world, but also to carry out operations on the sale and purchase of goods, works and services. To a greater or lesser extent, operations with bitcoins have been legalized in Australia, Austria, Bulgaria, Brazil, Israel, Canada, People's Republic of China, Norway, Singapore, the United States of America, Thailand, Germany, Croatia, Switzerland, Japan, and others. In Ukraine, the National Bank of Ukraine, on the basis of the aforementioned article of the Law of Ukraine «On the National Bank of Ukraine», indicated that the bitcoin has no legal status. Due to the peculiarities of the circulation of bitcoins, operations with them are carried out daily in Ukraine.

In science, there is a point of view that despite the widespread use of cryptographic goods worldwide for various types of purchases and transactions, there is no single position on the definition of legal cryptography, as well as its legal status. In addition, the above-mentioned circumstances cause difficulties in the criminal investigation of money laundering using cryptocurrencies. Thus, law enforcement agencies are faced with problems related to the establishment of the identity of criminals and the fact of committing a crime. The main problem faced by law enforcement bodies is precisely anonymity and decentralization [3].

The uncertainty of the legal status of cryptography creates real problems in law enforcement in Ukraine, especially when prosecuted. Thus, the case set out in the verdict of the Rubizhne City Court of Luhansk Oblast of 13.09.2018 in the case No. 425/2030/18 – a convicted person created for the purpose of using and distributing a malicious software intended for unauthorized interference with the operation of a computer, for the hidden installation of malicious software for the extraction of "crippling" XMR-Monero technical capabilities of "infected" computers (so-called "hidden mining"). As a result of the actions, the convicted person received income, which he subsequently legalized through transactions on various payment cards. The actions of the person were qualified under Article 361-1 of the Criminal Code of Ukraine [6]. However, neither the pre-trial investigation nor the court did not have qualifying acts that had signs of legalization of proceeds from criminal offenses. It is believed that this was due to the uncertainty of the legal status of the crippling currency, as well as the outdatedness of Article 209 of the Criminal Code of Ukraine. The specified determines the urgency and prospect of investigations of crimes in the sphere of cyberspace, including the legalization of the proceeds of crime, with the use of cryptocurrencies.

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GROMOVCHUK M. V.

Uzhhorod National University,
Associate Professor of the Department of Constitutional Law and Comparative Law, PhD in Law

HUMAN RIGHTS FOR INFORMATION IN SOCIAL NETWORKS: CURRENT ISSUES

Key words: *social networks, Constitution of Ukraine, Criminal Code of Ukraine, public appeals, right to information dissemination.*

At the beginning of the XXI century social networks became very popular. People use them in order to keep in touch with their families and friends. These are such global social networks as MySpace, FriendWise, FriendFinder, Yahoo! 360, Facebook, Orkut, Classmates and many others. Each country has its own social network. In the USA, for example, users use LinkedIn in order to have various business contacts and monitor opportunities for career development [1].

Information disseminate via social networks much faster than via the network of real life. Information can be revealed for the group of people unexpectedly because digital information is easy to be copied, can be kept for a long time at no allowance and is available for search. Especially harmful for users are those occurrences where information «travels» through different spheres and gets through people it is not intended for [2].

According to the Art. 34 of the Constitution of Ukraine: 1) everyone is guaranteed the right to freedom of thought and speech, and to the free expression of his or her views and beliefs (§1); 2) everyone has the right to freely collect, store, use and disseminate information by oral, written or other means of his or her choice (§2); 3) the exercise of these rights may be restricted by law in the interests of national security, territorial indivisibility (§3) [3]. For the enforcement of this constitutional provision in the Art. 28 of the Law of Ukraine “On Information” on 2 October 1992 is established the injunction on the use of information, in particular, for calls for infringement of territorial integrity of Ukraine [4]. In this very relation there is established in the Art. 109 of the Criminal Code of Ukraine on prohibition to commit public appeals and distributing materials with appeals to commit actions aimed at the forceful change or overthrow of the constitutional order or take-over of government and Art. 110 of the Criminal Code of Ukraine on prohibition to commit public appeals and distributing materials with appeals to commit actions aimed at changing the territorial boundaries or national borders of Ukraine in violation of the order provided for in the Constitution of Ukraine. Both prohibitions are aimed at security of territorial integrity of Ukraine [5].

In accordance with notes to the Criminal Code of Ukraine, public appeals envisage at least one public appeal to indefinite but significant range of persons, which includes ideas, views or enforcement demands intended to spread them through the population or its separate categories (public authorities, military etc.) in order to persuade a number of people to certain actions. Therewith, publicity is an evaluative dimension and the question about its occurrence should be decided separately for each accident taking into account time, place, circumstances of committing appeals and so on.

For the purpose of revealing an objective aspect of this crime, it is important to define notions, which characterize it, namely: «public appeals», «change», «forceful». Thus, Great Explanatory Dictionary of Modern Ukrainian Language does not have the term «public appeals», but includes a term «public», which it interprets in the following manner: «Public 1) which is taking place at the presence of public, common, nationwide, publicly-disclosed, open; 2) intended for wide use» [8]. Herewith, most of scientists assert that publicity means that appeals are of open, easily understandable character (underlined by myself) and refer to general public [9].

Taking into consideration that the term «public appeals» used by the Criminal Code of Ukraine consists of two words: «public» and «appeals» (where in the context of disposition of the Article 109 of the Criminal Code of Ukraine they cannot be disconnected), thus it is also important to reveal the essence of the term «appeals». The explanatory dictionary defines the category «appeals» as: 1) request, invitation to come, to arrive, to go somewhere (sound, exclamation, which calls, urges); 2) apply to a certain group of people, which briefly express a keynote of the time, policy input, task, proclamation, slogan (demand for developing any activity, to behave in a certain manner) [8].

However, it is not enough; there is also a necessity to apply to the doctrine of criminal law, where are the following views: 1) appeal, which is mentioned in §2 Art. 109 of the CC of Ukraine – is an active impact (underlined by myself) on indefinite number of people (listeners, readers, viewers), or on members of a certain party, organization, or other group, aimed at inducing of forceful change of the constitutional order [9]; 2) appeals – are such a form of influence on consciousness, will and behaviour of people, when by means of direct address to them there is formulated an inducement to a certain type of activity (in this case appeals are intended specifically to unite people and direct their behaviour to forceful change of the constitutional order [10].

The interpretation of mentioned above terms gives grounds to assert that the term «change», which is used in a disposition of the §2 Art. 109 of the CC of Ukraine should be used here in the following meanings: as an action; to force to fall down; to overturn by force; to kill; to destroy, to liquidate something (for example, political regime).

A subject of criminal legal protection provided by the Article 110 of the Criminal Code is the territorial integrity of Ukraine. Herewith, concerning the public appeals to commit actions aimed at changing the territorial boundaries or national borders of Ukraine in violation of the order provided for in the Constitution of Ukraine, public relations, upon which these actions impinge, have in our view some features. As expected, they lie in the fact that these relations occupy a relatively independent place in the system of national relations because there is also another subject of relation – it is information of that meaning, which perception by people can arouse a desire (intention) to commit actions aimed at changing the territorial boundaries or national borders of Ukraine in violation of the order provided for in the Constitution of Ukraine.

The presence of direct meaningful relation of analysed forms of encroachment with provisions of the Art. 34 of the Constitution of Ukraine requires a special consideration of the issue about guaranteeing of stated constitutional rights in solving questions about criminal responsibility according to the Art. 110 of the Criminal Code. These questions can be solved, in particular, with the help of defining a distinction of public appeals from related notions, which are concerned with enforcement of rights envisaged by the Art. 34 of the Constitution. Among these notions we consider: «public utterances», «rationale for committing actions», «justification of need for actions» «agitation», «propaganda». Thus, criminal legal prohibition is based on the notion that unambiguously expresses an individual's abuse of constitutional right, in particular, right to information dissemination. This abuse must be reflected in the essence of disseminating information. It is the very essence of the notion of public appeals in the Articles 109 and 110 of the Criminal Code of Ukraine, which is characterized by direction of informational influence for arousing a desire (intention) of other persons to commit actions aimed at forceful change or overthrow of the constitutional order or take-over of government, change of the territorial boundaries or national borders of Ukraine in violation of the order provided for in the Constitution of Ukraine.

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SAMOILENKO O. A.

National University «Odesa Law Academy»,
Associate Professor of the Department of Criminalistics, PhD in Law

ISSUES OF IMPLEMENTATION IN THE INTERNAL LEGISLATION OF UKRAINE NORMS OF INTERNATIONAL LAW IN THE SPHERE OF FIGHTING CRIMES TAKEN IN CYBERSPACE

The article deals with the implementation of the norms of international law in Ukraine's internal legislation, in particular the Council of Europe Conventions regarding the criminalization of crimes committed in cyberspace.
Key words: *implementation cyberspace, cybercrime, convention, criminalization, crime.*

Despite the detailed description at the interregional level of specific cybercrime compositions, the nature and list of offenses related to the cyberspace situation in national legal systems differ. Ukraine is no exception.

The starting points for understanding the legal framework of Ukraine in the fight against crimes committed in cyberspace are the norms adopted by European states in the city of Budapest on November 23, 2001 of the Council of Europe Convention on Cybercrime. Ukraine joined it with reservations by ratification on September 7, 2005. Today we can talk about other numerous agreements, universal, regional and local treaties on combating crimes in cyberspace, the norms of which can be implemented in the domestic legislation of Ukraine.

The standards of some of these treaties are directly recognized in the Convention on Cybercrime itself. In particular, the text of the Convention refers to such international acts ratified by Ukraine:

– in part of the determination by the state of boundaries of the observance of the human right to information, is an integral element of the human right to freedom of speech, – Council of Europe Convention on the Protection of Human Rights and Fundamental Freedoms of 1950 and the UN International Covenant on Civil and Political Rights of 1966;

– in terms of ensuring the protection of personal data stored in data files for automated processing, and preventing unauthorized access, modification or distribution – the Council of Europe Convention on the Protection of Persons in Connection with the Automated Processing of Personal Data of 1981;

– in terms of ensuring the protection of the child from all forms of sexual exploitation and sexual abuse – the UN Convention on the Rights of the Child 1989, the International Labor Organization Convention on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor;

– in terms of mutual assistance requests transmitted by telecommunication routes – to the European Convention on mutual assistance in criminal matters; – with regard to the protection of intellectual rights – to the Bern Convention for the Protection of Literary and Artistic Works (Paris Act of July 24, 1971, amended on October 2, 1979), Agreement on Trade-Related Aspects of Intellectual Property Rights; World Intellectual Property Organization Agreement on Copyright under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention);

– in terms of ensuring the equality of people before the law and equal protection against all discrimination and against all incitement to discrimination – to the International Convention on the Elimination of All Forms of Racial Discrimination;

Consider individual issues of implementation of the norms of international law in the national legislation of Ukraine regarding the criminalization of crimes committed in cyberspace.

The United Nations Convention against Transnational Organized Crime recommends that states criminalize crimes against the principles of sovereign equality and territorial integrity of states, as well as the principle of non-interference in the internal affairs of other states, laundering of proceeds of crime, participation in an organized criminal group, corruption, obstruction of justice conditions: 1) in more than one state; 2) in one state, but the essential stage of preparation, planning, management or control occurs in another state; 3) in one state, but with the participation of an organized criminal group that carries out criminal activities in more than one state; 4) in one state, but significant consequences occur in another state. Paragraph 29 of this Convention refers to training programs for law enforcement personnel in the aspect of «the methods used in the fight against transnational organized crime, which are committed using computers, telecommunications networks and other types of modern technologies».

For example, with the advent of cryptographic currency technology, the creation and circulation of which is based on the methods of cryptographic protection of information, corrupt practices, laundering of proceeds of crime through the use of such mutual settlements have become elusive for law enforcement agencies. Indeed, in the process of turnover of such currencies, there is no single leading entity; this technology allows storing information about the currency turnover is divided – on computers all over the world [1].

This is just one example of the opportunities that cyberspace provides for the commission of these crimes. At the same time, there is no indication in the national criminal law that cyberspace technologies are used for making public appeals or distributing materials calling for encroachment on the territorial integrity and inviolability of the state; financing actions committed to forcibly change or overthrow the constitutional system or seize state power, change the borders of a territory or state border; high treason; sabotage; espionage; legalization of proceeds from crime and other transnational organized types of criminal offenses.

Also noteworthy is the issue of regulation of criminal responsibility for the use of cyberspace for the commission of a terrorist act and other crimes related to it. In Ukraine, this area of the fight against terrorism is affected by bilateral treaties concluded with the United States, the Republic of Slovenia, Montenegro, the Kingdom of Belgium, the Kingdom of the Netherlands. The problems of fighting cyber-terrorism in the international legislative field are reflected in the form of draft acts or local, bilateral international treaties on procedural law. The countries of the European Union are discussing an interregional project Clean IT, the purpose of which is to organize a rapid response in the event of a threat of an act of cyber terrorism [2]. However, since there is no corresponding universal international act, cyberterrorism as a phenomenon and methods of countering it in Ukraine remains the only subject of research by scientists (V. Butuzova, S. Gavrisha, S. Gnatyuk, V. Golubeva, D. Dubova, A. Korchenko, V. Lipkana, V. Shelomentseva, S. Hildret).

A similar problem concerns not regulated in Ukraine as the crime of theft, transfer and use of personal data. Some countries identify crimes of this type as an independent category, others believe that these actions fall under several articles of criminal law [3]. According to K.S. Shakhbazyan, the dissemination of information by computer networks can result in both massive violations of human rights (for example, propaganda of genocide, dissemination of the idea of racial inequality), and disrespect for the rights of individuals. Therefore, the dissemination of information by computer networks, causes massive violations of human rights, is considered as an international crime, which entails the emergence of international legal responsibility of states and individuals [4, p. 71]. In the criminal law sphere of Ukraine, this issue is highly relevant and not developed.

Thus, the continuous development of scientific and technical potential, the improvement of international cyber security legislation naturally leads to the need to supplement certain articles of the Criminal Code of Ukraine with a qualifying attribute regarding the use of the cyberspace environment to commit the corresponding types of crimes (Art. 109-114, 157, 158, 159 , 159-1, 185, 189, 191, 258, 258-2, 258-3, 258-5, 263, 359 of the Ukrainian Criminal Law).

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TARASENKO L. L.

Ivan Franko National University of Lviv,
Associate Professor at the Department of Intellectual Property,
Informative and Corporate Law, PhD in Law

DOMAIN NAME DISPUTES

Key words: *domain name, court, trade mark, intelectual property, web-site.*

The development of the digital environment leads to a large number of websites. Some websites are very popular among users and that promotes the company-holder of the website, its commercial name and activity results within the market. Every website has its own «name» posted in the Internet. This is the domain name (domain) identifying a web resource in the global information network.

At a time when practically every member of society has access to the Internet using a computer, phone, tablet or other device, the existence and operation of a website becomes a necessity for every company wants to present itself in the Internet-environment. Thereby, there are unfair competition signs through the using of a domain name (website name) closer to the domain name of the competitor (other entity). Thus, due to the mixing of two websites names for the Internet users-potential customers, a domain dispute between two domain holders of similar domain names emerges. There is no regulation under Ukrainian legislation of the procedure for settling domain disputes. There is no unified legal regulation of settling such disputes in the EU and in the world at large. This is due the fact that the Internet is «a space without borders» and the administration of the Internet address space is performing by NGOs guided by their own rules and principles.

Domain dispute is a dispute concerning the legality (unfairness) of the domain name registration and use between the holder of the domain name and other interested person (for example, trademark certificate holder). There is a point of view highlighted in scientific literature that the settling of disputes, regarding to domain names, usually requires special knowledge in the province of information technology that causes a great difficulty both to the parties to a dispute and to mediators trying to settle [1]. Such a position is rather controversial, since even the court (other entitled person or body), solving this category of cases, does not require an expertise to verify claims or objections. We consider that special knowledge (expertise) regards the understanding of technical functioning of a website and the Internet, differentiation of technical features of the registrant, registrar and administrator of the address space in the Internet and technical possibilities to change the website holder, etc. Everyone can have basic knowledge of these circumstances, including judges, lawyers, etc., while the correct understanding of the technical nature of some issues is rather difficult.

The regulation of domain disputes considering and settling in Ukraine is characterized by the absence of special legal regulation of such a procedure. At first glance, this phenomenon is justified because state legislation cannot regulate relations emerging, changing and stopping within virtual «space without borders» all over the world.

In the international practice of resolving the domain name disputes the main regulative document is Uniform Domain Name Dispute Resolution Policy. This policy has been adopted by the Internet Corporation for Assigned Names and Numbers («ICANN») in 1999. Its terms are incorporated by reference into registration agreement between the registrant and the registrar, and this Policy is required for use in a dispute concerning the legality of the domain name registration and use between a domain name holder and other interested person.

Domain name dispute occurs when there are evidence of the registration and use of a domain name in bad faith:

– circumstances indicating that the holder of the domain name has registered or has acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that complainant, for valuable consideration in excess of his documented out-of-pocket costs directly related to the domain name;

– the domain name holder has registered the domain name in order to prevent the holder of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that he has engaged in a pattern of such conduct;

– the registrant has registered the domain name primarily for the purpose of disrupting the business of a competitor;

– by using the domain name, the registrant has intentionally attempted to attract, for commercial gain, Internet users to his website or other on-line location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of his website or location or of a product or service on his website or location.

Thus, all these domain registrant’s actions aim at the violation of economic competition in a particular province and unlawful «fight» against competitors entitled to rights to a trademark.

In Ukraine, the domain names administrators of second level also often indicate types of domain disputes that may occur between website holders and others. For example, under the Rules of domain disputes settling in domain .LVIV.UA, domain disputes may occur:

1. If the delegated to a defendant private domain name or a part of it is identical or confusingly similar to a registered plaintiff trademark, so that they can be confused.

2. If the plaintiff considers the defendant is not entitled to use the domain name or the using of it violates the rights and legal interests of the plaintiff.

3. If the spelling or pronunciation of the domain name delegated to the defendant is a word or expression that violates the honor and dignity of the plaintiff or harms their reputation.

4. If the spelling or pronunciation of the domain name or a part of it reproduces surnames, names or aliases of famous persons in Ukraine without their consent.

5. Other violations of the Rules by a defendant.

Therefore, the violation of applicant rights (plaintiff rights) can be proved by different facts: the violation of rights to a trademark, violation of other rights and interests of the applicant (including rights to a commercial name), violation of honor, dignity and business reputation, using of names of famous persons without their consent etc.

Domain disputes can also occur in case of the domain registration per person who is not the true holder of the site or in case of so-called «domain theft», that is the change of the registrant contact information, including «theft» by registrars, unfair employees (dismissed directors, technical specialists) or other persons. Such a phenomenon is highlighted in scientific literature, accenting on the fact that despite the domain using by a particular person claiming to be the website holder and paying for the domain and hosting, such a domain does not belong to that person because it is «stolen» and controlled by another subject [2]. This affirmation is also pointed out within comments on domain disputes issue. A field «admin-c» often indicates a person different to the one actually entitled to the right to use the domain name. For example, it may be a company employee, authorized to register the domain name, hosting company etc. It is worth stressing that it is only the entity that has registered the domain has the right of its disposal [1].

The abovementioned highlights the problem of non-acquaintance of people ordering websites for the development of their business (or other demands) and then posting them within the Internet. In order to function properly, a website shall at least have a domain name, providing the opportunity to find it in the Internet, and the hosting. Usually all these steps are complexly performed by a person (entity) providing the website development. Further, this person (entity) provides hosting and intermediation in the process of domain registration. Sometimes there are cases of unfair dealing resulting in domain registration not to the customer, but any other person specified above. At the same time, the customer usually does not understand what does it mean to be the registrant (website holder), due to the fact that he/she is provided with the opportunity to fulfill the website content, and the website operates without problems. However, over time, problems with the access to the website may occur, especially if this website turns out to be a successful one. In this case, the person – website registrant can «sell» (re-register) the website to a customer competitor. Thereby, a domain dispute emerges.

Taking into consideration the abovementioned, we should stress the point that the domain disputes arise regarding the use of the domain name without the consent of the subject of intellectual property rights to a trademark, commercial name, other commercial designations, name of individual, and other objects of intellectual property.

Domain disputes are usually initiated in order to stop the infringement of intellectual property rights, mainly rights to a trademark or commercial name pointed in a domain name. The aim can also lie in the nullification (cancellation) of domain registration violating the abovementioned rights or transfer (re-delegation) of rights to the domain to the complainant.

Settling such disputes, the norms of current legislation, the provisions of the Civil Code of Ukraine and the Law of Ukraine «On Protection of Rights to Trademarks for Goods and Services» (regarding the regulation of trademarks and commercial names protection) shall be applicable.

In addition, the courts guide by the rules that are not normative, but governing contentious relations between the parties to the dispute. In particular, these are as follows: .UA Domain Rules, The Regulations of domain names registration within .COM.UA and other rules provided by Ltd. «Hostmaster» (a high-level administrator of the address space) or other domain names administrators of second level. Nowadays, there are two main positions in the judicial practice regarding the legal nature of these documents. These rules are applicable as terms of accession agreement to the proposed conditions (if there is such a reference in contract between the registrant and registrar) or as a custom (if there is no such a reference). We consider both positions to be noteworthy, but the issue of the legal nature of these rules is the subject of a separate discussion. Moreover, the courts settling domain disputes often guide by the provisions of the Uniform Domain Name Dispute Resolution Policy. Analyzing the content of this Policy one can consider that in domain name dispute a complainant has to prove that: 1. the domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights to; 2. the defendant has no rights or legitimate interests in respect of the domain name; 3. the domain name has been registered and is being used in bad faith. In the proceedings the complainant has to prove that each of these three elements is present. So the subject of a complaint is the illegal registration of a domain name. Parties of domain name dispute are a complainant and respondent (defendant). Complainant means the party initiating a complaint concerning a domain-name registration. Respondent means the holder of a domain-name registration against which a complaint is initiated.

The defendant (potential offender) has to demonstrate the rights or legitimate interests to the domain name. In particular the domain name holder must demonstrate that: 1. before getting the notice about the dispute he has used the domain name, he has done demonstrable preparations to use it, and the domain name or a name corresponding to the domain name has been in connection with a bona fide offering of goods or services; 2. the registrant (as an individual, business, or other organization) has been commonly known by the domain name, even if he has acquired no trademark or service mark rights; 3. the domain name holder is making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.

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KHRAPENKO O. O.

National University «Odesa Law Academy»,
Associate Professor at the Department of Judiciary,
Law Enforcement Authorities and Advocacy, PhD in Law

«ELECTRONIC COURT» SYSTEM IN UKRAINE: TRENDSETTING AND CHALLENGES

The article substantiates the necessity of introducing technological solutions, in particular, «Electronic Court» system, which has become an important step towards transformation of legal activity from the established system to the communication model, which involves de-bureaucratization and increasing the efficiency of legal proceedings. In this context, the article analyzes the stages of implementation of the e-justice system, which laid the foundations for automation and informatization of the court process and highlighted their advantages.

***Key words**: e-justice, «Electronic Court», efficiency of justice.*

Researchers from different spheres guess that informatization of society has numerous risks, since it generates a large number of contradictions [3], and the ability of a person to timely realize and follow the pace of the functioning of the information environment is far behind these pace. As a result of this, there is a threat to the privacy of human life.

However, the abovementioned does not mean reducing the value of information technology to meet public needs. On the contrary, informatization of public relations becomes an important tool in areas that are of a purely public nature [1, p. 5], for example, public administration, a separate component of which is justice.

The democratic structure of the state envisages the division of the branches of power into legislative, executive and judicial, this axiom can serve also to e-democracy, the essence of which is the application of information and communication technologies (ICTs) to attract citizens into public and political life. which is a key component of a democratic system, in the context of the development of e-democracy in Ukraine, also does not remain unaltered and receives new tools for ensuring the accessibility of justice, efficiency and transparency of the judiciary.

In general, innovations of the Electronic Court system have resulted in organizational improvements, namely, the availability of justice through the introduction of electronic document circulation between participants in the litigation, reducing court costs and paperwork, accelerating the exchange of documents between judicial authorities and instances and many others. Indeed, the maintenance of transparency and accessibility of justice, the efficiency of the judicial system and the saving of public costs on the judicial system are also the main tasks of electronic justice.

The State Judicial Administration has developed and approved the Concept for the creation of a Single Judicial Information System whose purpose is to create and operate the «information and technological support of justice on the principles of balancing the need of citizens, society and the state in the free exchange of information and necessary restrictions on its dissemination» [4]. However, despite the fact that the Concept was approved in 2014, only with the entry into force of new procedural codes (December 15, 2017), namely, Civil Procedural Code, Commercial Procedural Code, Code of Administrative Proceedings, the legislator announced the introduction of a new Single Judicial information and telecommunication system.

Within the framework of Single Judicial information and telecommunication system of Ukraine, the project «Electronic Court» is currently in operation, the task of which is to improve the functional and technological capabilities of the information infrastructure of the courts of general jurisdiction. The priority objectives of the project are to ensure open access of process participants to information through the creation of modern Internet resources and the installation of information kiosks in the courts, a phased transition to the electronic exchange of procedural documents between court and participants of the process using digital signature, to electronic exchange of information from databases of other state bodies and institutions, to ensure the complete computerization of court proceedings, the formation of a single electronic archive of judicial documents [4].

The introduction of the «Electronic Court» system was developed in several stages in accordance with the needs of the judicial system. The main ones include the following steps:

1. Creation of a single local network through protected Internet channels and improvement of technical equipment of judicial bodies, creation of conditions for the use of electronic digital signature (EDS) for the protection of information in electronic documents.

2. Development of specialized software «Automated system of document circulation», which currently provides electronic document circulation and the establishment of judicial statistics. Thus, a closed cycle of processing information from its receipt to the transfer of court decisions to the State

Register of Court Decisions is created. It also greatly simplifies the generation of statistical reports for any period of the court's operation (the only condition – since the start of the work of the Automated system of document circulation of the court).

The main novelty of this phase was the introduction of an automated division of litigation between all judges of a particular court. The distribution algorithm takes into account the specialization of judges and their current load, which undoubtedly guarantees the impartiality and transparency of appointing a judge to a particular proceeding.

3. Ensuring electronic document circulation between the judicial authorities and other public authorities, in particular, the State Fiscal Service – for obtaining information on the taxpayer registration number (INN).

4. Creation of a system of automatic informing on the progress of consideration of litigation. The automated system of document circulation of the court, subject to the provision of the parties in a specific case of prior agreement, may provide dispatch of court summonses and procedural documents to the process participants by e-mail and in the form of SMS on the time and date of the court session in the case. This innovation has significantly accelerated the timing of sending judicial documents (in particular) and significantly increased the cost savings of correspondence.

5. Equipment of courtrooms with a complex of technical fixing of court proceedings and videoconferencing. The automated system of court documents also includes the registration of a court session journal, which, due to technical fixation, is formed by the secretary of a court session in an automatic mode.

Video conferencing allows for remote court sessions in cases where the participants of the proceedings can not personally be present at the court sitting while in a remote place in Ukraine or abroad. Equipping courtrooms with similar systems guarantees transparency and publicity of proceedings, since it allows you to broadcast the session on the Internet, while receiving a transmission of the video using YouTube video hosting.

6. Full-scale involvement of electronic communications and documents to speed up the receipt of information from State registries, obtaining attorneys' orders (in the case of providing free secondary legal aid), the creation of a single database of electronic addresses, fax numbers (telefax) of the authorities. All this allows de-bureaucratic and operational interaction between judicial authorities and other state actors in the process of judicial proceedings.

7. Implementation of the project and training of judicial staff in work in the «Electronic Court» system. In general, the implementation of the «Electronic Court» project has enabled the creation of effective mechanisms for the exchange of information between the Unified Judicial System Database and the Unified Register of Pre-trial Investigations, Unified state register of persons who have committed corruption or corruption-related offences, State Register of Voters, and many other state registers, «where the speed of updating information, its completeness, security by means of

cryptography and the exclusion of human influence from the information exchange process is very important for the work of law enforcement and control bodies of the state» [3].

Consequently, electronic litigation, as a direct activity of the court and related bodies, has a number of significant advantages:

– saving time and costs. Paper documents required personnel, financial and time costs, and did not provide reliability and efficiency. Currently, this problem is almost eliminated through the introduction of electronic document management;

– providing quick access to the materials of the parties' proceedings in the proceeding;

– elimination of the necessity to certify paper copies of documents, which avoids the time spent on the production of paper copies of documents, and the electronic copy will always correspond to the original and can be verified using system information;

– rational use of material resources (financial, natural, etc.).

But there are drawbacks. For example, O. Bryntsev notes «the unpreparedness of the legal field» [1, p. 19] to the full implementation of e-justice in practice. Courts, despite the «reloaded» procedural rules, are not in a position to abandon the paper form of the process, and electronic communication with the participants in the trial process is not always possible to adjust.

Thus, jurisprudence has always been a system in which technological solutions played far not the main role. But in today's conditions of transformation of society, changes in the vector of development of social processes in the direction of the information component and reloading of human activity and communication in the electronic form, legal activity acquires new properties, which are closely related to the informatization of society.

The introduction of technological solutions, in particular, the tools of electronic justice, is an important step towards the creation of a communication model of legal activity aimed at de-bureaucratization and increasing the efficiency of the functioning of public authorities.

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TSURCANU S. I.

International Humanitarian University,
Associate Professor at the Department of International and Comparative Law,
PhD in Law

THE AGE AND THE SUBJECT SCOPE OF APPLICATION OF GENERAL DATA PROTECTION REGULATION IN THE EU IN RELATION TO CHILDREN

The article discloses the age requirements for the legality of processing personal data. It is concluded, that the current wording of Article 8 GDPR will lead to significant inconsistencies in practice. An analysis of the content of information provided to children is carried out. It is proposed to establish a relationship between the child's right to access the Internet and the right to protection of personal data. Web sites that contain violent content should have limited access through registration. During registration, the age of the person should be checked using online technologies. In the case of a registration of a person under the age of 18, companies must request the consent from the parents for child's registration and processing of personal data, or evidence of child's emancipation.

***Key words**: personal data, GDPR, child, content, international law, European law, American law.*

Society in a network world is not restricted with any boundaries. This fact has both positive and negative aspects. On the one hand, the absence of any boundaries intensifies the processes of human development, because since 1969, when the special network, named ARPANET [1], was founded and became the prototype of the modern Internet, humanity got the opportunity to obtain information from any source, to communicate, to develop any projects, to use the copyright objects, etc. On the other hand, boundlessness of the Internet created the background for numerous legal violations, which constitute challenges not only for individual national legal systems, but also for European and international law in general. Illegal personal data processing is one of such violations.

In May 2018 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) will enter into the force. It is the first time, when the norms of direct action, which establish the protection of personal data of children, were established by the GDPR on the territory of Member States. A characteristic feature of legal regulation of personal data protection in the EU is equal status of children and adults, which is manifested in the absence of a separate legal act of the protection of children's rights online (compared, for example, with the United States, where the Act of the protection of children privacy online (COPPA) was adopted in 1998), and in the same definition of their rights regarding the personal data processing.

However, the GDPR contains norms, addressed directly to children. Particularly, according to the part 1 of article 8 of the GDPR processing of personal data is considered to be legal in case of having the consent of a child, who is 16 years old. In cases with individuals, aged less than 16 years, it is necessary to obtain the consent of a child's parents or persons with parental responsibility in order to make data processing legal. Deviating from the general norms in paragraph 2 of part 1 of article 8, European lawmaker provided an opportunity for states to set a lower age limit, but not crossing the threshold level of 13 years' age [2].

Thus, the national legislation of Member States of the EU must set the requirement to obtain parents' or guardians' consent for the legitimacy of data processing of children, aged 13 to 16 years. Moreover, such a flexible approach to determining the age limit produces many legal collapses.

Firstly, the age requirements of the GDPR do not correspond with the Basic international law in the sphere of protection of the children rights – Convention on the rights of the child (hereinafter the Convention). Particularly, according to article 1 of the Convention, a child means every human, being below the age of 18 years old, if under the law, applicable to the person, he / she doesn't reach adulthood earlier. Thus, the analysis of legal norms of the Convention and the GDPR gives the opportunity to state the following legal assessment: 1. The norms of law of the EU contradicts international law; 2. This contradiction generates two streams of the legal requirements for children personal data processing: 18-year age limit is to be applied to all norms, that contain mention of a child. Article 8 has a separate legal regime: it is applied to children under the age of 13-16 years. This duality of the rules regarding children may potentially cause some misunderstandings and misuse of the GDPR [3].

In addition, peculiarities of national legislation of EU Member States regarding the emancipation of juveniles were not taken into account during the development of the GDPR. For example, in Lithuania or Estonia juvenile may be emancipated, when they are 15 years, on the basis of a court resolution. For girls the age of emancipation can be less than 15 years in the case of pregnancy [4]. Based on the fact, that due to emancipation the young person gets full capacity, 16 age limit regarding consent for personal data processing contradicts the content of the category "capacity", and therefore the article requires clarification in this part.

Secondly, article 8 of the GDPR brings an inconsistency among Member States in the European digital environment [5]. Particularly, the following question appears: if one state sets the requirement to get the parents' consent for the personal data processing at13 years age, and another one sets the same requirement at 16 years' age, will the consent, given by persons over 13-year age, be valid in this another state? In addition, as according to the article 3 of the Regulation it may be applied to enterprises, which are established or having domicile outside the territory of the EU, but offer services or goods to EU citizens, there is the incompatibility of the requirements of the GDPR with the American COPPA. Thus, according to the article 1 of COPPA a child is a person under 13 years' age [6]. The relevant position of the USA compared with the EU does not violate the norms of international law, because the USA is one of the three countries, which still has not signed the Convention on the rights of the child. The fact of «non-signing» of the Convention tells of open disregard of the international standards in the sphere of children rights protection by the United States of America. Accordingly, U.S. companies will require consent only from parents, whose children have not reached 13 years' age, what will determine inconsistency of its activity to the higher age requirements of European countries.

From the point of view of practical implementation of this provision there may be some difficulties in checking of the age of the person, who registers or provides information. Existing web – sites and services usually determine the minimum age (at least 16 or 18 years) in the information field of services using. In the graph «The terms and conditions of use» is prescribed: users should be aware, that in case of use of the services they are not less than 16 years for all third parties [7]. Before GDPR's entry into force such privacy policy was generally acceptable. Further improvement of the mechanism of children rights online protection requires mandatory measures of verification of the person during registration, especially as to child's access to "adult" sites. Due to the above-mentioned, it is necessary to find out to which online content the requirement of parents' consent providing for the child's personal data processing is applied.

A literal interpretation of article 8 of the GDPR indicates that parents' consent is required only in respect of offers of information society services directly to a child.

According to the article 2 (a) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, the information society service is any paid service, that is provided remotely using electronic means and upon individual request [8]. If to use this definition of information society services, the scope of applying of the requirement of parents' consent providing is limited. Particularly, consent is required only when paid services are provided, based on what the personal data processing in social networks, while receiving personal data from web – sites, that provide free services, remains outside the scope of the Regulation, and accordingly, child's personal data would remain unprotected. However, systematic interpretation of the GDPR testifies, that the developers of the Regulation have expanded the concept of «information society service». Thus, article 3 refers to the expansion of the GDPR rules for all operations, related to the offer of goods or services, regardless of payment. Of course, the ambiguity of these EU legal acts generates multiinterpretation for category «information society service».

The GDPR contains direct regulations of a restrictive nature, which will influence negatively on the state of children personal data protection. Article 2 of the Regulation provides the extension of its provisions only to the personal data processing totally or partially with automated means of data processing. The GDPR left out the data processing, which occurs outside of an automated system, – in case of social networks or non – skilled users [5].

In this context one of COPPA's rules may attract the attention. According to article 4 information about the child can be obtained from the web – site or online service, dedicated to children, through the home page of the web – site; preferential service; electronic mail; ads web-site or in chat [6]. This article has double restrictive meaning compared with the GDPR. At first, the American legislator has limited the effect of normative rules with indication on the direction of web – sites – they contain information and provide services, dedicated just for children. It means that, for example, the requirement of parents' consent does not apply for scientific and educational sites. Secondly, the completeness of the Internet sources list of information about a child limits the cases of its application.

Thus, age limits for the consent providing for personal data processing require some refinement. With the purpose of bringing into line with the normative provisions of the Convention on the rights of the child it is necessary to set 18 years' age to provide independent consent for personal data processing, except the cases of emancipation of juveniles, provided for by laws of states. The 18 age limit will contribute to establishing of additional guarantees regarding the limitation and control of children access to websites, which contains information of a sexual or violent nature, by parents. Information society service is any paid or free service, which is provided remotely via electronic means and upon individual request. Depending on the type (content) provided services should be classified into: 1. services, provided with verification of the person registering; 2. services, that do not require verification of the person registering. Such cooperation of protective measures regarding the realization of the right of access to the Internet and the right for personal data protection will provide an effective mechanism for their realization taking into account network threats.

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PLOTNIKOV O. V.

Public Organization «DESYATE KVITNYA»,
Senior Lawyer, PhD in Law

THE NEED FOR SPECIFIC APPROACH TOWARDS INFORMING MEMBERS OF MARGINALISED GROUPS OF THEIR RIGHTS: PRACTITIONER'S REFLECTIONS

Key words: *Raising awareness, information campaigns, marginalized groups, conventional rights.*

A famous maxim of human rights philosophy is that we are all somehow a minority. The entire idea of human rights is largely about protection of particular minorities from despotism of an abstract and undefined majority. While the rights of «average» members of the «majority» are well-defined in the practice of the European Court of Human Rights (hereinafter ECtHR), the specific rights of minority groups attract greater attention of the Strasbourg jurisprudence. According to Al Tamimi [1], between 1959 and 1999 there were 16 ECtHR judgements concerning specific rights of vulnerable minority groups, compared to 80 in 2011, 82 in 2012 and 70 in 2013. Such cases are now making about 7% of Court's jurisprudence, and it appears that these numbers are on the increase.

The notion of «vulnerable group» was first introduced in *Chapman v. the United Kingdom* [2], where the Court found that special consideration must be given to the needs of the Roma community due to their special lifestyle. Since then, the concept of vulnerability is being developed both in the scholarly works and in practice [7].

The United Nations uses a similar concept of marginalised groups. Here the author joins the opinion of Maina Kiai, the UN Special Rapporteur on the rights to freedom of peaceful assembly and association, in her observation that the term «marginalised» is preferable, as the word «vulnerable» points at helplessness and victimhood, while the term «marginalised» means personal situation created by actions of omissions by States and non-State actors. Members of marginalised groups are pressed into certain conditions by actions of the others, and this term is more accurate to description of situation of individuals who became marginalised because of external influence [4]. Further, this paper will use the term «marginalised» to describe individuals and groups who are referred to as «vulnerable» by the ECtHR.

Kiai lists persons with disabilities, youth, women, LGBTI, indigenous people, internally displaced persons and non-nationals, including refugees, asylum seekers and migrant workers among those who are most frequently subjected to marginalisation. Sometimes these features overlap (like refugees with disabilities, or LGBTI asylum seekers), and this increases their marginalisation.

Marginalised groups and communities find themselves excluded from public life. Such exclusion has two major consequences in terms of human rights protection. Firstly, individuals belonging to such groups suffer a greater deal of discrimination and persecution (alongside with other forms of human rights violations). Secondly, such individuals have less protection of law and public institutions in practice, and are frequently subjected to various forms of institutionalized discrimination and restrictions in exercise of their rights. Combined with their specific needs, that imply specific forms of exercising the rights, this makes marginalised groups and communities common victims of systematic human rights violations. As a result, individuals belonging to marginalised groups get into a vicious circle, where violations of their rights result from exclusion, and exclusion gets deeper with every new violation.

The circle ruins belief in law and institutions, they attempt to avoid contacting the authorities and look for marginal solutions of their problems. Due to lack of belief, members of marginalised groups lack information on legal opportunities for protection of their rights, including in the international institutions. An obvious consequence is that they do not apply to such institutions and their grievances are largely overseen. Less obvious is that the lack of information creates unrealistic expectations if they still decide to apply. They may miss the elements determining the success of the application, like the personal documents, evidence of violation, etc.

The practical barriers faced by the individuals belonging to marginalised groups in applying to the ECtHR are the following: 1. One must be aware that they are a victim of a human rights violation; 2. One must be aware of an opportunity to apply to the courts, including to the ECtHR and understand the importance and effectiveness of such application (as opposed to resolution of individual problems by marginal or illegal means); 3. One must be, at least at the minimum level, aware of the procedure of application, including the need to collect evidence; 4. One must know of the right to have legal aid and be able to utilize this right by claiming assistance from public free legal aid institutions, human rights NGOs, international organizations, etc. [6].

These obstacles result from poor information of the members of marginalised groups, steming from low literacy levels, lack of formal education and poor understanding of law and often from unwillingness to know more about law, resulting from lack of trust. On the other hand, members of marginalised groups are often active users of digital products that bring them the information of the world in a convenient form.

The idea that the Internet must contribute to legal education of members of marginalised groups on their rights is not new. Just to name an example, Mehra, Merken and Bishop [2] in 2004 suggested that Internet and other digital technologies must contribute to social inclusion and equation of access to information on individual rights. At present, international institutions run entire information campaigns aimed at legal education of particular vulnerable groups in specific situations or regions [3].

The European Court is apparently in line with these developments. With abundant information booklets on its website, presence in the social media, and a number of experts running their own informational channels on the Convention and Court, it seems that the digital information distribution is sufficient. Yet the on-field experience leads to less optimistic conclusion that each of the abovementioned barriers remains problematic for members of marginalised groups.

The author's personal experience is limited to work with refugees, asylum-seekers and stateless persons in Ukraine. The conclusions made may be partial and incomplete. Therefore, the author seeks rather to define the existence of a problem that is subject to further research. Further, the conclusions are made based on personal communication with seven asylum seekers. These problems are the following.

Coming to the first barrier, members of marginalised groups often do not understand that a certain action, event or practice constitutes a violation of their rights. Thus, several Muslim asylum-seekers detained at the Migrant's custody center reported that they are not allowed to eat and drink at night during the Ramadan due to existing regimen. They perceived it as a punishment. Many asylum-seekers, believed that their arbitrary administrative detention was a form of punishment.

Speaking of the second barrier, the concerned individuals were aware of the application option, but were often reluctant due to fears that the application may lead to worsening of their situation in Ukraine or in the country of origin. They balanced the practical value of application against the associated risks and considered the ECtHR to be a measure of last resort in face if inevitable consequences of violation of their individual rights (for example, deportation to home countries exposing their lives to risk). At that, in their balancing the risks of application appear to overly heavy, while the benefits of the application are underestimated.

The third and the fourth barrier are easier for asylum-seekers since they, as a group, attract attention of local human rights NGOs and the UN Refugee Agency. The problem lies rather in communication with the authorities in order to meet the persons of concern and obtain documents from their files. Although the asylum-seekers as a group benefit from greater international support in protection of their rights, an additional language and cultural barrier may prevent them from properly advancing their cases.

The current approach towards distribution of information on the European human rights protection system by digital means offers only a partial solution, as it is not designed to meet the specific needs of individuals belonging to marginalised groups. For sure, the case law of the Court, accompanied by various information documents (like admissibility guides) contains information on various aspects of protection of rights of members of vulnerable groups, but these documents are written for lawyers and are hardly understandable for average persons.

Some local solutions are now implemented in Ukraine, most notably WikiLegalAid – a project of the Government of Ukraine run by the Coordination Center for Legal Aid Provision. This web site designed after Wikipedia offers easy-to-understand explanations on practical legal problems, including application to the European Court. However, even this project is not detailed enough to meet the specific needs of marginalised groups. It is also in Ukrainian only.

In view of the increasing number of applications and raising concern of the specific needs of members of marginalised groups, the need for development of special approach to informing such individuals of their rights and procedure of application to the Strasbourg Court is pressing. Such approach must take into account the barriers that such individuals encounter in protecting their rights. Implementation of such approach will facilitate the overcoming of social isolation and bringing the violations out of shadow.

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LARIONOVA Y. O.

Kremenchuk Mykhailo Ostrohradskyi National University,
Student of Faculty of Law, Humanity and Social Sciences

MALOVA A. S.

Kremenchuk Mykhailo Ostrohradskyi National University,
Senior lecturer of the Department of Jurisprudence Sciences of Faculty of Law,
Humanity and Social Sciences

DISCLOSURE OF COMMERCIAL OR BANKING SECRECY: CRIMINAL LIABILITY IN THE LEGISLATION OF UKRAINE AND EUROPEAN COUNTRIES

Key words: *Disclosure of commercial or banking secrecy, criminal liability in the legislation of Ukraine and European countries.*

In modern life, we still have to deal with violent types of crimes such as murder, theft, robbery, and rape, but from time to time there are tendencies to increase or decrease them, depending on how the conditions of that or that another historical epoch. In addition, in the 21st century new, no less dangerous types of encounters arise. Information from year to year becomes meaningful, and its loss or blockage can create not only a threat to material goods, but also life and health of people. In particular, this refers to information about the person's activities in the field of finance, its financial position, etc., as public confidence in banks is growing, the services of remote control of funds are gaining in popularity, and consequently the number of attacks on such data is increasing. In order to effectively counteract and prevent an offense from the state, appropriate measures are required. The urgency of this work is determined by the urgent need to investigate the liability for disclosure of commercial and banking secrecy in Ukraine, to verify its effectiveness and to compare these measures with those used in well-known successful experience of European countries.

Thus, domestic legislation provides for only criminal liability for disclosure of banking or commercial secrets. According to Art. 232 of the Criminal Code of Ukraine, commercial secret means information related to production, technological information, management, finances and other activities of an enterprise or other economic entity whose disclosure may harm its interests. At the same time, it should be noted that for the bank the relevant information is information not about their own activities, but about outsiders. Therefore, the concept of banking secrecy should not be equated with the notion of commercial secrets [2, c. 723-724].

As regards the objective aspect of the crime in question, it consists in actions in the process of which the commercial secret is exposed to disclosure, thereby communicating with unauthorized persons, and the consequences that are expressed in the form of causing substantial harm to the subject of economic activity. It should be noted that the domestic legislator points out precisely to causing damage to a business entity, and not to a particular individual – that is, the owner (or owners). The same disclosure can be made in any way. Important for the qualification of an act is the exact definition of the moment of the end of the crime, which coincides with the moment when the owner of the commercial secret of causing material damage is caused.

The subject of this crime may be a person:

– which commercial secret became known due to its special relationship with the owner of the secret;

– which is a representative of the counterparty or partner of the relevant business entity and received information that is commercial secret, subject to its non-disclosure;

– who is an official of the state authority and received relevant information on the basis of the law while performing his official duties.

From the subjective side, the crime is characterized solely by direct intent and mercenary or other personal motive, which in practice is considered a favor or, conversely, an aversion to a certain person, a desire to harm the leaders, etc.

The responsibility for disclosure of commercial or banking secrecy is to impose a fine of 1-3 thousand non-taxable minimum incomes of citizens with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to 3 years.

These acts are often posted in the sections of criminal laws, which are aimed at protecting non-economic interests of the enterprise, and the personal secrets of the person, even if the latter has a direct commercial or banking significance.

Thus, in the Criminal Code of Switzerland, the legislator considered the crime envisaged in Articles 162 and 273 [6], which are interrelated. According to Art. 162, the one who discloses the industrial or commercial secret that he is obliged to keep as a result of lawful or contractual duties, who uses the disclosure for himself or another person, is punishable by a prison imprisonment or a fine. In this case, the legislator indicates both the obligation of a private prosecution and the subject subject to such liability. Art. 273 provides for the liability of a person who sees the industrial or commercial secret to make it available to a foreign service organ, or a foreign organization, or a private enterprise, or their agents, who makes available to another official agency, or a foreign organization, or a private enterprise, or their agents for industrial or commercial secrets. Under this norm, a guilty person is punishable by imprisonment, and in more severe cases, a convict prison. A fine may also be imposed with imprisonment.

Another approach is used by the legislator in Spain. Yes, according to Art. 278 of the Criminal Code of Spain [5], a person who, in order to disclose commercial secret, possesses in one way or another, information, written or electronic documents, information devices or other objects that are a commercial secret, is punishable by imprisonment for a term from 2 to 4 years and a fine of 12 to 24 monthly salaries. At the same time, according to Part 2 of Art. 278 of the Criminal Code of Spain, imprisonment for a term of

3-5 years and a fine of 12-24 month salaries, for similar acts, if disclosed secret will be distributed, issued or transferred to third parties. Separately, the legislator specifies the responsibility of specially authorized persons. According to Art. 279, distribution, extradition or commission of a commercial secret committed by a person who by law or by contractual obligation has a duty to protect it is punishable by imprisonment of 2 to 4 years and a fine of 12 to 24 monthly salaries. If the given secret is used guilty in his own interests, the punishment is imposed on him within the limits of the lower sanction. According to Art. 199, the one who disclosed someone else's secret information about which he learned due to his official position or employment relationship is punishable by imprisonment for a term of 1 to 3 years and a fine of 6-12 monthly salaries. In cases where the person whose professional duty is to protect the secrets of other persons discloses them, it is punishable by imprisonment for 1-4 years, a fine of 12-24 months' wages and a deprivation of the right to engage in certain activities for a term from 2 to 6 years old.

According to the provisions of Art. 273 of the Criminal Code of the Netherlands [4], a person who deliberately disclose specific information related to a commercial or industrial organization or service organization in which it operates or worked, which it was obliged to keep secret, or disclose or use for the purpose of material gain, data obtained through a criminal offense from a computer device or a system of a commercial or industrial organization or service organization, and which relate to such organizations, if these data are at the time of their opening The use or application was not well-known, and if such disclosure or use could be a loss, it is subject to a term of imprisonment of no more than 6 months or a fine of 4 categories.

Consequently, it is noticeable that the heterogeneity of the legislator's approaches in certain European countries has been traced to the criminalization of acts of disclosure of commercial or banking secrecy. In almost all European countries, the legislator does not distinguish between banking and commercial secrets. In the vast majority of cases this is due to the fact that the responsibility for the disclosure of bank secrecy obviously does not fall under criminal law, and in some cases covered by the notions of commercial information, or company information, etc. Thus, domestic legislators criminalize the disclosure of commercial or banking secrecy, and in a separate section – its use and collection, while European lawmakers criminalize acts aimed at obtaining such information (collection), even without their disclosure as a final result. An analysis of the location of the syllables of the analyzed crimes in most of the Criminal Code of foreign countries indicates that the greatest harm is caused not to relations in the sphere of economic activity, but to a particular individual (group of persons) who are the owners of commercial or banking secrets.

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SECTION 3.
EUROPEAN COURT OF HUMAN RIGHTS CASE LAW

CHANTURIA L.

European Court of Human Rights,
Judge in respect of Georgia,
Doctor of Law

JUDICIAL DIALOGUE: ON THE METHODS AND PRINCIPLES OF APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Key words: *European Convention on Human Rights, domestic law, concept, Cour de cassation.*

Introduction. Formal recognition of the European Convention on Human Rights (hereinafter referred to as the Convention) as part of the domestic law of the States parties to the Convention does not present particular difficulties. Although the ways of incorporating the Convention into the national legal system are different, all the States determine its status and place within their legal system (*Grabenwarter/Pabel, Europäische Menschenrechtskonvention, 6. Aufl. 2016, § 3 Rn. 2*).

Nevertheless, the effectiveness of the application of the Convention with regard to individuals largely depends on the judiciary and functioning of domestic courts. Along with the fact that by adopting laws (for example, abolishing the death penalty on the basis of Protocol No. 6) or by implementing various reforms (improving the conditions of detention in penitentiary institutions), the state implements standards and requirements of the Convention, it is extremely important that judges understand and apply the Convention when dealing with concrete cases. The process of applying the Convention involves both judges of the European Court of Human Rights in Strasbourg (hereinafter the Strasbourg Court or the Court) and judges of various judicial instances in the States parties. At the same time, the manner in which these judges apply the Convention varies greatly.

The concept of the Convention is not reduced to the text of this international legal document and its Protocols. It implies first of all the rich case-law of the Strasbourg Court (hereinafter – the case-law), in which the Court interprets specific rights and freedoms enshrined in the Convention. By adopting specific court decisions, the Court establishes standards significance of which go beyond the particular case (*Ireland v. the United Kingdom, 01.18.1978, Series A, no. 25, p. 154*). Therefore, the application of the Convention by domestic courts, the determination of the scope of specific rights and correct understanding of the main provisions of the Convention are impossible without the case-law and standards established by it

(*Recommendation of the Committee of Ministers of the Council of Europe of December 18, 2002 Rec. (2002) 13*: www.coe.int).

Although judges of both the Strasbourg Court and domestic courts are charged to apply the Convention, the principles and methods of their work, as well as their jurisdiction, are characterised by certain specificities.

For the judges of the Strasbourg Court, the Convention is the main source of law, since the Court decides whether applications lodged before it meet the requirements of the Convention and its case-law. For judges of domestic courts, the Convention serves an additional source of law when examining criminal, civil, administrative and other types of cases. The Strasbourg Court further relies on the legislation and case-law of the States parties.

The main purpose of the Strasbourg Court is to establish a breach of or compliance with the standards of the Convention by the State party. A judge of a domestic court checks the compliance of the actions by state bodies with the requirements of the Convention. The different legal status of the Convention within the domestic legal system predetermines the differences and peculiarities of the jurisdiction of domestic courts.

Although domestic courts are obliged to apply the Convention and it case-law, in some instances the application of the case-law without amending the national law is rather difficult. This happens when legislation imperatively establishes restrictions that are contrary to the Convention, for example, if the law establishes an unreasonably short limitation periods, which the Strasbourg Court found to be in violation of Article 6 of the Convention.

In the process of practical application of the Convention by domestic courts, an important issue of access to the case-law often arises. Judges in the States parties use the state language at work, and they are not required to be fluent in the official languages of the Strasbourg proceedings. To solve the problem of providing courts with relevant case-law in understandable languages remains one of the central issues of the implementation of the Convention.

The effectiveness of the Convention in the States parties depends not only on the execution of specific Court judgments in relation to a particular state. It largely depends on the recognition and acceptance of the case-law by the domestic courts. To a certain extent, there is a dialogue between the judges of the Strasbourg Court and the domestic courts of the States parties. This is primarily reflected in the fact that judges in Strasbourg carefully consider opinions and arguments of domestic courts. In assessing the actual circumstances of the case, the Strasbourg Court relies on the facts established by domestic courts.

In practice, there are also cases when judges of domestic courts do not agree with the interpretation adopted in Strasbourg (*Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights, 2016, p. 36*).

The work of the judges of the Strasbourg Court are based on certain principles, some of which deserve particular attention, such as **the fourth instance doctrine, the absence of Doctrine of precedent, the Convention as a «Living Instrument», the comparative interpretation or autonomous concepts.** The specifities of these principles make obvious the difference between the working methods of the judges of the Strasbourg Court and those of judges in the domestic court.

With the entry into force on 1 August 2018 of Protocol No. 16 in relation to 10 States parties (Albania, Armenia, Estonia, Finland, France, Georgia, Lithuania, San Marino, Slovenia and Ukraine) there appered a new form and the possibility of a dialogue between the Strasbourg Court and domestic courts. The Supreme and Constitutional Courts are given the opportunity to request an advisory opinion from the Strasbourg Court on the points of interpretation and application of the rights and freedoms enshrined in the Convention and its Protocols. The advisory opinion, which is adopted by the Grand Chamber of the Court, contains the reasons and arguments of the Court, but it is not binding on domestic courts.

The prerequisite for applying to the Strasbourg Court for an advisory opinion is that a request must originate in pending domestic proceedings currently being heard by a highest court or tribunal or Constitutional Court. The first advisory opinion was adopted on 10 April 2019 at the request of the French Court of Cassation *(Cour de cassation)*, and it concerns the issue of recognition a birth certificate issued abroad to a child born abroad as a result of a gestational surrogacy arrangement.

This opinion is noteworthy in that the Grand Chamber for the first time defined the boundaries of advisory opinion requests. It confirmed that the Court has no jurisdiction either to assess the facts of a case or to evaluate the merits of the parties' views on the interpretation of domestic law in light of Convention law, or to rule on the outcome of the domestic proceedings. Its role is strictly limited to furnishing an opinion regarding the questions submitted with the requirements of the Convention and its case-law.

KIVALOVA T. S.

National University «Odesa Law Academy»,
Doctor of Law, Professor, Honoured Lawyer of Ukraine

THE EXPERIENCE OF THE UNITED KINGDOM CASE LAW IN FORMING OF HUMAN RIGHTS PURSUANT TO THE ECHR JUDICIAL PRACTICE

Key words: *European Court of Human Rights, ratio decidendi, Constitution.*

The European Court of Human Rights entitles its own practice as a case-law. The basis of the judicial precedent in the judicial practice of the ECHR is the principle of ratio decidendi (from Latin – the basis for resolution), and the precedent manifests itself in the fact that in the decision of cases the Strasbourg court tends to follow as a whole the approaches that were used by them earlier, if not recognized as necessary to change them. In particular, in the motive part of the judgment (imperative conclusion), the court, instead of reproducing the arguments it has previously expressed, may refer to the considerations expressed in previous decisions [5, p.71]. At the same time, the ECHR has repeatedly emphasized that it is not bound by its own previous decisions and, indeed, from time to time changes its legal positions. This is justified, because although the possibility of changing judicial practice does not contribute to legal certainty, it should be noted that there is a dialectical contradiction between legal certainty and the development of law. Although it can be argued that ECHR's own decisions are not necessarily mandatory.

However, it is important to consider how the national judicial systems should refer to the case-law of the ECHR, in particular, whether the ECHR's decisions should not be binding in a particular sense, at least for some of them, given that the parties to the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) are countries with different legal traditions belonging to both the Anglo-Saxon legal family (countries of «common law») and the Romano-Germanic legal family (the «continental law» countries).

Having examined the Anglo-Saxon precedent of England, which is a member of the United Kingdom, the latter acts precisely because of the doctrine stare decisis (the law of the same circumstances should apply equally) in its more rigorous modification. Therefore, the impression may seem that the precedent of the ECHR should be perceived in England as an Anglo-Saxon precedent, and should take the highest level in the hierarchy of precedents.

However, the situation is different – in the event of a conflict between the precedent of the ECHR and the precedent of the highest court in England, only the last one (Leeds City Council v. Price and others) applies. This assertion can be seen in the judgment of the Court of Appeal regarding the incompatibility of the ECHR case-law in Connors v. 2004. United Kingdom with the precedent established by the House of Lords in 2003 in the Harrow London Borough Council v. Qazi. As a result, it was argued that in such circumstances, the courts of England should be guided by the precedent of the House of Lords, and not the precedent of the ECHR.

The said position received unanimous support among all members of the House of Lords in deciding on the outcome of an appeal against the decision of the Court of Appeals in Leeds City Council v. Price and others. Thus we have a relatively unique precedent and confirmed by the highest court regarding the primacy in applying in national courts of national law over the application of ECHR case-law.

Moreover, such a conclusion of the House of Lords extends not only to the priority of the national precedent, but also to the priority of the national law. Thus, Lord Braun explained that, given the compliance with the national law of the Convention, the court cannot give more weight to human rights. Moreover, Lord Hope noted that if national law cannot be interpreted in a manner consistent with the Convention (in light of the ECHR practice), then the law must be applied (p.86 of the decision) and Lord Brown emphasized that the court cannot give more weight to the rights of a person than is provided by national law (p.202 of the decision) and should proceed from the fact that the national law is in conformity with the Convention (paragraph 203 of the decision) [4].

At the same time, the Anglo-Saxon precedent is not perfect in the context of the realization of human rights. There are rare cases of discrimination based on different criteria in the case law of the United Kingdom.

Thus, in the case of «Chaidan v. Godin-Mendoza» (2002), the judge of the UK District Court, based on his decision in the case of «Fitzpatrick v Sterling Housing Association Ltd» (1999), concluded that same-sex marriages are not equivalent to marital relations. While the ECHR in the case «Salguelro v. Portugal» (2001) emphasized that the Convention does not allow differences based on sexual orientation [8].

Thus in the case file has been said that the word «man» (in the context of marriage) applies only to heterosexual couples under the law and the case law of the UK. The ECHR, having decided on the case «Chaidan v. Godin-Mendoza» (2002), noted that such a wording at the legislative level is discriminatory and contrary to the Convention for the Protection of Human Rights and Fundamental Freedoms.

Moreover, the Strasbourg Court explained that same-sex marriages are also considered marital [4].

Another example is the case of «P.M. v. United Kingdom» (2005) regarding discrimination on the legal status. The applicant was recorded as the father of the child who was born with him with his partner outside the marriage. After their divorce (a marriage was not registered officially), the applicant was exempted from the tax on the amount that he paid for the child's maintenance, in accordance with the separate accommodation agreement that the latter concluded with his former partner. However further, Inland Revenue Office was deprived of this right, given that he had never been married to the mother of his daughter. The position of the ECHR in this case is as follows – in both cases (whether married or not), persons are parents of their children and are obliged to pay for their maintenance. Thus, unmarried parents who have established family life with their children may claim equal rights with their married parents regarding contact and care. The Strasbourg Court ruled that it did not see the reasons for the applicant's attitude not as a parent in a marriage divorced and living separately from the mother in the context of a reduction in the tax on child support. The goal of tax reduction was the desire to facilitate married parents to support a new family, so it is not clear why single parents who established such relationships could not bear the corresponding financial obligations, while equally demanding a discount [7].

Considering the precedent issues of discrimination through the prism of Ukrainian legislation, it should be emphasized that the latter is one of the most democratic, humane and legal aspects of the realization of human rights under the Convention. Moreover, the conclusions of the ECHR are binding, and the decisions are binding on the territory of Ukraine, which is confirmed by the Law of Ukraine «On enforcement of decisions and application of the European Court of Human Rights practice» No. 3477-IV of February 23, 2006 [3].

At the same time, the provisions of the Convention are reflected in both the State Main Law – Constitution and other normative legal acts [1]. Thus, the Constitution of Ukraine provides that human rights and freedoms are the highest social value of the state, while international treaties ratified by the Verkhovna Rada of Ukraine are part of the national legislation of Ukraine [2].

Consequently, after the signing of the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1950 and the beginning of the European Court of Human Rights in Strasbourg in 1953, the experimental idea of protecting human rights only on the basis of the Constitution or the Convention becomes a Common-European recognition. The ECHR's case law is universally recognized in Europe and holds an independent place in the continental system of law. Further consideration by the Anglo-Saxon legal system of the ECHR positions will serve as a progressive step towards improving the mechanism for the protection of human rights and fundamental freedoms.

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KRET G. R.

Supreme Court,
Judge of the Cassation Criminal Court, PhD in Law, Associate Professor

THE CONCEPT OF THE STANDARD OF PROOF «REASONABLE SUSPICION» IN THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS

The article is devoted to the research of the legal concepts of the European Court of Human Rights regarding the interpretation of the concept of a standard of proof «reasonable suspicion».
Key words: *standard of proof, reasonable suspicion, European Court of Human Rights.*

Indicating the importance of adherence to the standard of proof «reasonable suspicion» in the practice of national courts, the ECHR widely uses it when establishing compliance of their decisions to article 5 § 1 (c) and part 3 of article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The first specified standard of the ECHR was used in the judgment from 30.08.1990 in the case of Fox, Campbell and Hartley v. the United Kingdom, in § 32 of which the Court noted that the «reasonableness» of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in article 5 § 1 (c) [1]. Subsequently, the ECHR drew attention to the importance of this standard in criminal proceedings in a number of judgments, indicating that the persistence of reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the lawfulness of the continued detention (§ 153 of the judgment from 06.04.2000 in the case of Labita v. Italy, § 73 of the judgment from 01.06.2006 in the case of Mamedova v. Russia and others) [2; 3]. With this guarantee, as noted the ECHR in § 48 of the judgment from 13.11.2007 in the case of Cebotari v. Moldova and in § 175 of the judgment from 21.04.2011 in the case of Nechiporuk and Yonkalo v. Ukraine, it follows that in the absence of a reasonable suspicion arrest or detention of an individual must never be imposed for the purpose of making him confess or testify against others or to elicit facts or information which may serve to ground a reasonable suspicion against him [4; 5].

The widespread application of the standard of proof «reasonable suspicion» in the practice of the ECHR has led to the formation of a number of criteria that indicate an understanding of its concept.

Turning to the definition of the concept of a standard of proof «reasonable suspicion», the ECHR initially focused on its factual side. So, giving a definition of its concept for the first time, the Court in § 32 of the judgment from 30.08.1990 in the case of Fox, Campbell and Hartley v. the United Kingdom agrees with the Commission and the Government that having a «reasonable suspicion» presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence [1]. This definition has been repeatedly used by the Court in other cases, in which the applicants indicated a violation by national courts in the course of criminal proceedings of article 5 § 1 (c) and/or part 3 of article 5 of the Convention (in particular, § 155 of the judgment from 06.04.2000 in the case of Labita v. Italy, § 108 of the judgment from 19.10.2000 in the case of Włoch v. Poland and others) [2; 6].

Over time, the ECHR, following the definition of the concept of the standard of proof «reasonable suspicion», given in § 32 of the judgment from 30.08.1990 in the case of Fox, Campbell and Hartley v. the United Kingdom, along with its factual side, additionally drew attention to the its legal side. So, in § 109 of the judgment from 19.10.2000 in the case of Włoch v. Poland ECHR has indicated that in addition to its factual side, the existence of a «reasonable suspicion» within the meaning of Article 5 § 1 (c) requires that the facts relied on can be reasonably considered as falling under one of the sections describing criminal behaviour in the Criminal Code. Thus, there could clearly not be a «reasonable suspicion» if the acts or facts held against a detained person did not constitute a crime at the time when they occurred [6].

In its practice, the ECHR drew attention to the close relationship and the interdependence between the reasonableness of the suspicion and the circumstances of the criminal proceedings. So, in § 32 of the judgment from 30.08.1990 in the case of Fox, Campbell and Hartley v. the United Kingdom the Court noted that what may be regarded as «reasonable» will however depend upon all the circumstances [1]. Thus, the ECHR has noted the need to establish the existence of a reasonable suspicion in every criminal proceeding, taking into account all its circumstances, in particular those indicating about the possible guilt of a person in committing a criminal offense.

In accordance with the established practice of the ECHR, the conclusions about the existence of reasonable suspicion set out in judgments of national courts should be based on the evidence provided by the prosecution party and sufficient in their combination to detain a person or take into custody. So, the ECHR indicates that article 5 § 1 (c) does not presuppose that the police should have obtained sufficient evidence to bring charges, either at the point of arrest or while the applicants were in custody (§ 53 of the judgment from 29.11.1988 in the case of Brogan and Others v. the United Kingdom, § 55 of the judgment from 28.10.1994 in the case of Murray v. the United Kingdom and others) [7; 8], because in the presence of such evidences the police would, it can be assumed, have laid charges and the applicants would have been brought before the competent legal authority (§ 53 of the judgment from 29.11.1988 in the case of Brogan and Others v. the United Kingdom) [7]. In this regard, the ECHR came to the conclusion that facts which raise a suspicion need not be of the same level as those necessary to justify a conviction, or even the bringing of a charge which comes at the next stage of the process of criminal investigation (§ 55 of the judgment from 28.10.1994 in the case of Murray v. the United Kingdom, § 36 of the judgment from 16.10.2001 in the case of O'Hara v. the United Kingdom) [8; 9]. At the same time, the ECHR recognized that neither is it necessary that the person detained should ultimately have been charged or brought before a court (§ 48 of the judgment from 13.11.2007 in the case of Cebotari v. Moldova) [4], and the fact that an applicant has not been charged or brought before a court does not necessarily mean that the purpose of his detention was not in accordance with Article 5 § 1 (c) (§ 155 of the judgment from 06.04.2000 in the case of Labita v. Italy) [2].

From the position of the ECHR, a reasonable suspicion in no case can be based on the subjective assumptions of the subjects of proof regarding the committing of a criminal offense. So, focusing on the factual side of reasonable suspicion, the ECHR in § 48 of the judgment from 13.11.2007 in the case of Cebotari v. Moldova noted that the fact that a suspicion is held in good faith is insufficient [4]. As scientist indicates, the assumption, even in good faith, is not a sufficient justification of suspicion, neither is a general negative personality characteristic [10, p. 122], in this regard the restriction of the right to liberty and personal security can only take place if there is a reasonable suspicion and a subjective conviction (bona fide) only is not enough [11].

Thus, the concept of the standard of proof «reasonable suspicion» in the practice of the ECHR is characterized by the following aspects: 1) a reasonable suspicion involves the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the act falling under signs of a criminal offense, the responsibility for which at the time of its commission was established by the norms of the Criminal Code; 2) a reasonable suspicion must be based on all the circumstances of the criminal proceedings established at the time of the detention, remand in custody or extension of the period of detention, and on the evidence is which provided by the prosecution party and sufficient in their aggregate to make appropriate judgment, and can not be based on assumptions.

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SOROCHYNSKYY M. G.

European Court of Human Rights, Registry, Lawyer,
PhD in Law, J.S.D. (University of Notre Dame)

DEVELOPMENT OF THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS CONCERNING THE RIGHT TO EXAMINE ATTESTING WITNESSES

Key words: *European Court of Human Rights, case-law, attesting witnesses.*

Late 2018 and early 2019 saw interesting developments in the case-law of the European Court of Human Rights under Article 6 § 3 (d) (right to examine witnesses) of the European Convention on Human Rights. The interest of these developments for Ukraine is that the Court has finally taken a position on the special status of «attesting witnesses», the term which in the Court's terminology translates the Ukrainian term «*поняті*». This special status is a special feature of the Ukrainian legal system and it is interesting to see how this particularity is now reflected in the Court's case-law.

In Ukrainian criminal procedure the function of attesting witnesses is to observe certain investigative actions and to certify that the records of those actions accurately reflect what actually happened. Article 223 of the 2012 Code of Criminal Procedure requires the investigator to invite at least two uninterested people as attesting witnesses to observe such investigative actions as search, identification parade and reconstruction. By contrast, the status of other witnesses, which can be called «material» witnesses, is regulated in separate provisions, in particular Articles 95-96 of the Code.

The old 1964 Code of Criminal Procedure contained analogous provisions. Similar rules also exist in Russian criminal procedure.

The question this presented for the European Court of Human Rights was whether and how to apply the guarantees of Article 6 § 3 (d) to attesting witnesses, taking into account their specific status.

The fact that domestic law used a totally different term, «понятий» as opposed to the literal term for witness, «свідок», is not a problem in itself: the Court has long held that the term «witness» used in Article 6 § 3 (d) has an autonomous meaning which is not necessarily dependent on the domestic legal classification (*Asch v. Austria*, 26 April 1991, § 25, Series A no. 203). For example, the Court has no problem classifying experts as witnesses (for example, *Matytsina v. Russia*, no. 58428/10, 27 March 2014, or *Constantinides v. Greece*, no. 76438/12, 6 October 2016).

The fact remained, however, that the attesting witnesses had specificities. The Court first confronted them in a case against Russia. In *Shumeyev and Others v. Russia* decision (nos. 29474/07 and 3 others, 22 September 2015) the Court dealt with a group of cases lodged by applicants accused of drug-dealing. The police had organised test purchases from them through undercover agents, documenting those purchases by written reports. The undercover agents and police officers testified during the applicants' trials. The attesting witnesses summoned by the prosecution failed to appear at the trials but the Russian courts read out their pre-trial statements regarding the test purchases and admitted them as evidence against the applicants. The records of test purchases drawn up by the police were also admitted as evidence by the courts. The pre-trial depositions of the attesting witnesses were identical to the relevant police records. The Court held that such circumstances did not disclose a breach of Article 6 § 3 (d) of the Convention because the attesting witnesses' statements duplicated the contents of corresponding police records, contained no new relevant information and were, in essence, redundant evidence which did not require appearance in court.

The *Shumeyev* decision could be interpreted as setting the bar higher for applicants who wished to formulate an arguable complaint concerning failure to examine attesting witnesses at the trial. It was not sufficient merely to state that such witnesses were not examined. The applicant had to show that, in the particular circumstances of his case, the evidence of those witnesses had particular importance and was not merely redundant evidence. Because *Shumeyev* applicants failed to do that, their applications were rejected.

After *Shumeyev* the Court clarified general principles concerning examination of witnesses for the prosecution in the Grand Chamber's *Schatschaschwili v. Germany* judgment (no. 9154/10, ECHR 2015). The *Schatschaschwili* clarified the three-step test to be used in cases where statements of absent witnesses are used against the applicant. This test involves answering three questions: (i) was there a good reason for the non-attendance of the witnesses? (ii) was the evidence of the absent witnesses the sole or a decisive basis for the conviction? and (iii) whether there were sufficient counterbalancing factors to compensate for the handicap for the defence created by the admission of the witness's statements.

After the clarification of that test in *Schatschaschwili* the question became how to apply it to attesting witnesses. Should attesting witnesses be seen as witnesses for the prosecution, as they were treated in *Shumeyev*? Or can they sometimes be seen as witnesses for the defence?

The Grand Chamber answered the latter question in *Murtazaliyeva v. Russia* (no. 36658/05, 18 December 2018). It treated attesting witnesses in that case as witnesses for the defence. More generally, it established a new separate three-part test for defence witnesses. According to *Murtazaliyeva* (§ 158), to answer the question of whether a refusal to call a witness for the defence breached Article 6 § 3 (d) the Court would ask: (i) whether the request to examine a witness was sufficiently reasoned and relevant to the subject matter of the accusation? (ii) whether the domestic courts considered the relevance of that testimony and provided sufficient reasons for their decision not to examine a witness at trial? and (iii) whether the domestic courts' decision not to examine a witness undermined the overall fairness of the proceedings?

Ms Murtazaliyeva was convicted of preparation of a terrorist act after explosives were found in her bag in the presence of attesting witnesses. She argued that the explosives had been planted by the police and tried to call the attesting witnesses at the trial to throw doubt on the results of the search. The trial court refused to call them.

Distinguishing *Shumeyev*, the Court treated these attesting witnesses as «witnesses on behalf» of the applicant because their testimony would have ranged beyond the mere modalities of the search and the information which could be found in the police records (§§ 136 to 138). On the facts, applying the three-pronged test, the Court found no violation of Article 6 § 3 (d). It appears that one of the key factors in this decision was a contradiction in the applicant's own position at the trial: she asked for the attesting witnesses to be called but at the same time argued that the police officers had planted the explosives in her bag *before* the attesting witnesses arrived (§ 169). Therefore, it was logical to conclude that the attesting witnesses could not have helped her case much.

The first Ukrainian case in which the Court confronted the issue of attesting witnesses head-on became *Garbuz v. Ukraine* (no. 72681/10, 19 February 2019), adopted shortly after *Murtazaliyeva*. Mr Garbuz was convicted of bribery. The attesting witnesses observed how the police had marked the banknotes to be used as a bribe and then discovered the banknotes near the applicant's office and the traces of the luminescent substance on his hand and pocket. They signed the relevant police reports which documented those facts. They also described the same facts in pre-trial statements to the investigator. The reports themselves were introduced as evidence against the applicant, and the officers who had drawn them up were examined at the trial. The events were video recorded and the recordings themselves were introduced as evidence (§ 38). The applicant also confessed but rather withdrew his confession.

Despite repeated summonses, the attesting witnesses failed to appear at the trial and their pre-trial statements were eventually read out. The applicant objected to this and complained under Article 6 § 3 (d). He argued that he had been framed and the marked banknotes had been planted near his office by the police and that it was also the police who contaminated his clothes with the luminescent substance.

The most interesting part of the Court's reasoning was its approach to the attesting witnesses under Ukrainian law. The Court considered that, because the trial court referred to the statements of those witnesses in convicting the applicant and listed them as elements of evidence separate from the relevant police reports which those witnesses certified, those attesting witnesses were to be seen as witnesses for the prosecution and the *Schatschaschwili* test had to be applied.

Applying that test, the Court, on the facts, found the applicant's complaint manifestly ill-founded. The essential reason was that the applicant, like the applicants in *Shumeyev*, limited himself to saying that the attesting witnesses were not examined, but remained silent on key points of his own case.

Thus, the Court observed that the domestic trial court had repeatedly summoned those witnesses, asked the police and the prosecutor's office to bring them to court. The applicant did not identify any problem in those efforts. The Court concluded, in answering the first *Schatschaschwili* question, that there was a good reason for the witnesses' absence from the trial and the admission of their statements (§ 41). Likewise, the applicant did not explain what role those statements played in his conviction. The Court, accordingly, saw no reason to see them as «sole» or «decisive» evidence against him (§ 42). Finally, on the third *Schatschaschwili* question, the Court considered that there were sufficient counterbalancing factors to compensate for the admission of the attesting witnesses' statements. First, even though Mr Garbuz had had full opportunity to cast doubt on the credibility of those witnesses, he had failed to mention in his application whether he had actually ever attempted to do so. Second, there was other corroborative evidence of the applicant's guilt, including the victim's and police officers' testimony, physical and expert evidence and the applicant's own confession. In short, the applicant's case was weak and poorly argued.

The judgments in *Murtazaliyeva* and *Garbuz* clarify the approach the European Court of Human Rights takes to the question of attesting witnesses. In principle, the same approach applies to them as to any other witness: they can be seen as either witnesses for the prosecution or for the defence. The determination is to be made in light of the tenor of the applicant's own complaint and the particular circumstances of the case. Accordingly, either the *Schatschaschwili* or *Murtazaliyeva* test would apply.

That said, as the *Garbuz* judgment and the *Shumeyev* decision show, the particular status of the attesting witnesses in domestic law requires the applicants to be more vigilant in formulating and substantiating their complaints under Article 6 § 3 (d) as far as these witnesses are concerned.

The views and judgments expressed in this article are author's own. They do not represent the position of the European Court of Human Rights, its Registry of the Council of Europe.

PETRENKO V. S.

Kievskiy District Court of Odesa,
Judge of the Kievskiy District Court of Odesa, PhD in Law, Associate Professor

FEATURES OF APPLICATION IN THE CIVIL JUSTICE OF THE EUROPEAN CONVENTION ON THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

***Key words**: ratification, human rights, European Convention on Human Rights and Fundamental freedoms.*

Ukraine's ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms became an effective instrument for the protection of human rights. A person, who applies to a court, has the opportunity to refer directly to the Convention on the Protection of Conventional Rights and to the practice of the European Court of Human Rights. The courts apply the Convention and the Court's case law as a source of law in the examination of cases in accordance with Part 1 of Art. 17 of the Law of Ukraine «On implementation of decisions and application of the practice of the European Court of Human Rights».

Ukraine fully recognizes in its territory the effect of Article 25 of the Convention on Protection human rights and fundamental freedoms of 1950 to recognize the competence of the European Commission of Human Rights to accept from any person, non-governmental organization or group of persons a statement addressed to the Secretary General of the Council of Europe on the violation of the rights of Ukraine set forth in the Covenant Articles, and articles 4 6 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms on the recognition of the jurisdiction of the European Court of Human Rights, which is mandatory and without a special agreement. That is provided by the Law of Ukraine «On Ratification of the 1950 Convention on the Protection of Human Rights and Fundamental Freedoms, First Protocol and Protocols No. 2, 4, 7 and 11 to the Convention». That is why the Convention is an integral part of national legislation and should be implemented in the actual practice of the courts.

The European Convention on the Protection of Human Rights and Fundamental Freedoms, as an international treaty, has a certain priority over the law's application of the current law, but, applying the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, one should proceed from the assumption that the highest priority is the Constitution of Ukraine regarding the ones that are valid for Ukraine international treaties. The conclusion of international treaties that contradict the Constitution of Ukraine, is possible only after the introduction of appropriate amendments to the Constitution of Ukraine that is according to Part 2 of Art. 9 of the Constitution of Ukraine.

It is possible to draw the following conclusion from the above. The provisions of the European Convention on the Protection of Human Rights and Fundamental Freedoms in the system of normative acts of Ukraine have the force of law and a formal priority over other laws in the context of competition. The accession to the European Convention on the Protection of Human Rights and Fundamental Freedoms puts the States Parties in an obligation to bring their legislation in the line with European standards.

The judgment of the European Court of Human Rights (ECHR) has a significant impact on the practice of the enforcement of domestic courts. But the mechanism of such influence is specific, since the States Parties to the Convention, as a rule, carry out appropriate measures of general or special nature arising from decisions of the European Court on human rights. The Council of Europe's position on the implementation of the European Court of Human Rights was reproduced in Recommendation No. R (2000) 2 of the Committee of Ministers on the review of cases and the resumption of proceedings at the domestic level in connection with decisions of the European Court of Human Rights of 19 January 2000 p. The Committee of Ministers noted in this Recommendation that according to Art. 46 of the Convention, the States parties of the Convention have undertaken to comply with the decisions of the European Court of Human Rights. In addition, Protocol No. 14 strengthened the mechanism of implementation of ECHR judgments, providing for the possibility of reviewing cases of non-compliance with its own decisions.

But neither the ECHR, nor the Committee of Ministers of the Council of Europe could force the state, for example, to take certain measures of a general nature – changes in national legislation and the general practice of applying legislation.

There is a widespread view that ECHR rulings have a pretentious character for national judicial practice in the legal theory. At the same time, it should be borne in mind that the ECHR takes different decisions in terms of the impact on the practice of national courts. The ECHR makes decisions on specific cases (Articles 42, 43, 44), decisions and decisions on the inadmissibility of applications submitted to the court (Article 45), the appeal of the Panel of Members of the Grand Chamber on the interpretation or application of the provisions of the Convention, or Protocols to it or other issues of a general nature (Clause 2 Article 43) in accordance with the Convention. the Grand Chamber adopts a ruling in the latter case. In addition, the ECHR adopts advisory opinions on the interpretation of the Convention and the Protocols thereto in accordance with clause 1 of Art. 47, art. 49 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, at the request of the Committee of Ministers.

Since 2004, the ECHR has adopted so-called «pilot decisions» that address the systemic issues of the States parties to the Convention and which urge a state to adopt appropriate measures of a general nature to overcome them. The entry into force of Protocol No. 14 to the Convention in 2010 has led to a simplification of the procedure for handling complaints about which the ECHR has already adopted «pilot decisions», as well as the possibility to suspend consideration of all other similar cases before the adoption of the «pilot decision». The most violent state is given time to take appropriate revenues, including compensation for all victims of similar violations, as well as amendments to national legislation. The implementation of the «pilot decisions» of the ECHR provides for a permanent dialogue between the respondent State and the Committee of Ministers, which is responsible for overseeing the implementation of ECHR judgments.

The system of acts adopted by the ECHR is the acts of application and acts of interpretation of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols. Irrespective of the nature of court decisions, they are binding on States Parties to the Convention.

The obligation of all decisions of the ECHR causes controversy over the nature and extent of their precedent. The precedent of decisions of the ECHR is considered not only from the point of view of a case-law, but from the standpoint of universal necessity. Universal Obligation is a broader feature of the decisions of the ECHR.

Literal interpretation of art. 1 of the Law of Ukraine «On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms accepted in 1950, the First Protocol and Protocols No. 2, 4, 7 and 11 to the Convention» may lead to the conclusion that only decisions are binding on Ukraine Court, which was adopted against Ukraine. But the ECHR proceeds from the universality of its practice, despite the subjectivity of cases, and in its decisions refers to all the established judicial practice. Such approach to ECHR reflects the principle of legal certainty and ensures predictability of ECHR decisions. With the application of the European Convention on Human Rights and Fundamental Freedoms, Ukrainian courts can apply all the practices of the ECHR, that is, decisions made both in relation to Ukraine and other states.

The practice of the European Court of Human Rights has been diverse and has a significant impact on the practice of national courts, since the European Convention for the Protection of Human Rights and Fundamental Freedoms and the practice of the ECHR are applied by the courts in the consideration of cases concerning the protection of property rights, honor and dignity and business reputation, respect for private life, freedom of thought, conscience and religion, freedom of expression, in the event of questions of fair trial, etc.

The determining factor for the implementation of the European Convention on the Protection of Human Rights and Fundamental Freedoms, the practice of the ECL by national courts, is the recognition of the jurisdiction of the ECHR as binding on the interpretation and application of the Convention and the Protocols thereto. The application of the Convention should be based on the practice of the ECHR in order to prevent any violation of the Convention and used by the courts. Therefore, decisions of courts should be taken into consideration by the courts in the decisions of the ECHR, which interpret the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which require application in a particular case.

From the point of view of judicial enforcement, and in view of the fact that national laws, norms of the European Convention on Human Rights and

Fundamental Freedoms and ECHR judgments interact as complementary and interlinked systems, the application of the rules of the Convention and ECHR judgments in itself should be considered appropriate, effective and necessary in substantiating the motivating part of court decisions in the event of a conflict between national legislation and an international treaty. References to the ECHR's decisions may also confirm the provisions of national law. In such cases, court rulings containing references to international law and international treaties appear to be more reasoned. The fundamental importance of the norms of the European Convention on the Protection of Human Rights and Fundamental Freedoms and the ECHR's decisions are, in the cases of gaps in domestic law and law enforcement practice, in interpreting national law in the context of the requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

BULETSA S. B.

Uzhhorod National University,
Head of the Department of Civil Law and Process, Doctor of Law, Professor

ZABOROVSKY V. V.

Uzhhorod National University,
Professor of the Department of Civil Law and Process,
Doctor of Law, Associate Professor

STOYKA A. V.

Uzhhorod National University,
Student of the Magistracy of the Law Faculty

REFORMING THE PROCEDURAL LEGISLATION OF UKRAINE THROUGH THE PRISM OF LEGAL PURISM AND FORMALISM IN THE LAW

Key words: *judicial system, right to a fair trial, purism.*

At the present stage of state-building, the efficiency of the functioning of the judicial system in Ukraine has become an indicator of the level of development and interaction of such categories as the state and civil society, where the sub-category is the judiciary, and the landmark is human rights. In such circumstances, respect for the guarantees of the right to a fair trial is almost the main indicator of the rule of law.

Thus, the right to a fair trial, provided for in Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (hereinafter referred to as the Convention) includes various constituent elements, each of which is interpreted by the European Court of Human Rights (hereinafter – ECHR) in the consideration of a particular case which indicates the violation of this article. In the case of Golder v. The United Kingdom [1], the ECtHR first established the right of access to a court as an integral aspect of the guarantees of the right to a fair trial under Art. 6 of the Convention. The embodiment of this right includes, among other things, the right to institute proceedings in court, where the guarantees of clause 1 of Art. 6 of the Convention apply both to the organization and the composition of the court and to the trial of the case (Naim-Laman v. Switzerland [2]). However, the existence of a person's right to a claim may depend not only on the substantive content of the relevant right, but also on the existence of procedural prohibitions that impede or limit the possibility of presenting potential claims to a court (McElhine v. Ireland [3]), which consist in establishing too formal requirements for the procedural documents filed by a person (Case Beles et al. v. the Czech Republic [4]). Thus, in the legal science the concept of «legal purism» appeared.

The very term «purism» was defined as an exaggeration of aspirations for the purity of the language, excluding all other elements from it [5, p. 796]. Now it implies an excessive desire for purity, the superiority of form over content. The notion of legal purism as a restriction of the guarantees of access to a court was first applied by the ECtHR in the case of Sutiazhnik v. Russia [6], where, under this term, strict adherence to laws was understood not for the purpose of correction of court mistakes or insurmountable circumstances, but in contrast to the principle of legal certainty, which consists in the abolition of the correct decision on the merits in violation of the procedural rules of the case.

Procedural obstacles connected with the appearance of a person in court were manifested in the formalism of law. Thus, the establishment of the state of formal requirements was known in the Roman law, which was based on the expression: «Summum jus sum injuria est – Absolute execution of the law leads to the greatest injustice» [7, p. 108]. Formalism in the law is expressed in the tendency and desire in the application of the right to give preference to the letter of the law before its actual intention. And may be manifested, for example, in the event of the finding of an inadequate proof of payment of a court fee for filing an appeal, a payment order for payment due to the failure of indicating the case number, within which the relevant complaint is filed and the date of the adoption of the contested act of appeal [8].

Thus, with the introduction of changes to the procedural legislation [9], the domestic legislator, in some way, introduced the tendency of formalization of the requirements for the right to apply to the court for protection, while at the same time on their expediency and feasibility. Such requirements have appeared, including the financial sphere. In particular, the narratives of the Ukrainian civil procedural law became the provision on the preliminary (oriented) calculation of the amount of legal expenses that it incurred and is expected to incur in connection with the consideration of the case (Article 134 of the Civil Code of Ukraine, Article 124 of the Code of Economic Procedure of Ukraine), as well as the provision of judicial expenses (Article 135 of the Civil Code of Ukraine, Article 125 of the Code of Economic Procedure of Ukraine). From an objective point of view, it is rather difficult to calculate the costs that a party may incur in the proceedings, since it is not possible to determine in advance what procedural actions will be required in the future to protect their rights and what costs will be incurred in this regard [10, p. 114]. And the application to the party of such a measure, such as the maintenance of court costs, may deprive a person of remedies (Garcia Manibardo v. Spain [11]), and will provide an opportunity to challenge the preservation of the status quo between the parties. And in order for national legislation excluding access to the court to be compatible with Art. 6 of the Convention, it must be compatible with the rule of law (Baka v. Hungary [12]).

Conclusions: Legal purism and formalism in law are phenomena, albeit of the same content, but different in consequence. Thus, legal purism requires a particularly careful approach to the definition, since it violates such a property of a court decision as res judicata and the principle of legal certainty. Formalism in law, on the contrary, while restricting the right of a person to access the court, manifests its necessity in a more serious attitude of the person to the trial, as well as to the potential possibility of pre-trial settlement of the dispute.

However, the Ukrainian legislator incorrectly approached the establishment of formal requirements in the financial sphere, since it is inappropriate to raise citizens' legal awareness by collecting funds from them [13], it is possible to approach this question by introducing the appropriate procedure for pre-trial settlement of a dispute, the first attempt of which has not been successful (Draft Law on Mediation dated December 2015).

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BAKAYANOVA N. M.

National University «Odesa Law Academy»,
Head of the Department of Judiciary, Law Enforcement Agencies and Advocacy,
Secretary of the Disciplinary Chamber of the Odesa region
Qualification-Disciplinary Commission of the Bar, attorney, Doctor of Law

HONESTY AND GOOD REPUTE OF THE LAWYER IN ECHR'S JUDGMENTS

This article addresses the issues and proposes on honesty and good repute of the lawyer as a fundamental principle of Ukrainian Rules of Advocates' Ethics. Analyzing the ECHR's practice, the author examines aspects of observance of this principle in practice of law and concludes that the requirement of honesty and good reputation of the lawyer follows from the nature, tasks and functions of the Bar.
Key words: *bar, practice of law, honesty and good repute of the lawyer, ECHR's practice, rules of advocates' ethics.*

The European Parliament resolution on the legal profession and the general interest in the functioning of legal systems of 23 March 2006 «recognizes fully the crucial role played by the legal professions in a democratic society to guarantee respect for fundamental rights, the rule of law and security in the application of law, both when lawyers represent and defend clients in Court and when they are giving their clients legal advice» [1].

The special role of lawyers, as independent professionals, in the administration of justice entails a number of duties, particularly with regard to their conduct *(Van der Mussele v. Belgium, 23 November1983, Series A no.70; Casado Coca v. Spain, 24 February 1994, § 46, Series A no.285-A; Steur v. the Netherlands, no. 39657/98, § 38, ECHR2003-XI; Veraart v. the Netherlands,* *no.10807/04, § 51, 30 November 2006; and Coutant v. France(dec.), no.17155/03, 24 January 2008).* Whilst they are subject to restrictions on their professional conduct, which must be discreet, honest and dignified *(Steur v. the Netherlands,no. 39657/98, § 38, ECHR2003-XI)*.

For these reasons, *honesty and good repute of the lawyer* as a fundamental principle was supplemented by the Ukrainian Rules of Advocates' Ethics in 2019 (Art. 12^1, 44, 65).

Describing the limits of the conduct of lawyers, the ECHR in its practice refers to the principles developed by the Council of Bars and Law Societies of Europe (CCBE). The Charter of Core Principles of the European Legal Profession, which was adopted at the plenary session in Brussels on 24 November 2006, declares *the dignity and honor of the legal profession, and the integrity and good repute of the individual lawyer* as one of the core principles of the European legal profession: «To be trusted by clients, third parties, the courts and the state, the lawyer must be shown to be worthy of that trust. That is achieved by membership of an honorable profession; the corollary is that the lawyer must do nothing to damage either his or her own reputation or the reputation of the profession as a whole and public confidence in the profession. This does not mean that the lawyer has to be a perfect individual, but it does mean that he or she must not engage in disgraceful conduct, whether in legal practice or in other business activities or even in private life, of a sort likely to dishonour the profession. The disgraceful conduct may lead to sanctions including, in the most serious cases, expulsion from the profession» [2]. The Code of Conduct for European Lawyers which was originally adopted at the CCBE Plenary Session held on 28 October 1988, «Trust and Personal Integrity»: «Relationships of trust can only exist if a *lawyer's personal honour, honesty and integrity* are beyond doubt. For the lawyer these traditional virtues are professional obligations» (2.2) [3].

Given that national courts as well as European Courts refer on a regular basis to the Charter and the Code of Conduct of the CCBE, it was felt that this question needs to be assessed very carefully.

The appeal to philosophy, legal doctrine, ethical codes of the law profession, which operate in different countries, and, above all, to life itself, allows us to formulate the thesis that the high moral qualities of a person are connected in the consciousness of each person with honesty. Honesty from the word «honor», that is worthy of respect.

The content of the categories «honesty of the lawyer», «good reputation of the lawyer» is being discussed in the legal community. The judgments about their subjective nature are inaccurate: rather, it can be argued that there is a subjective attitude to them, but they do not change depending on their interpretation.

Peter J. Henning rightly pointed out: «Finding the truth is the object of the judicial system, but it is not the governing principle for the lawyer. Instead, the focus for the lawyer should be honesty in dealing with clients, opponents, and the system» [4, p. 214].Truth and honesty, of course, are related, however, as concepts, they are not identical. Truth concerns the specific circumstances and facts that are established by the court. The integrity of the lawyer focuses on the accuracy and reliability of the lawyer's allegations. Whenever the lawyer informs the court, the other party, lawyer colleagues or his client, this message must be honest.The principle of honesty governs the lawyer in all forms of representation, not just when he is acting on behalf of a client in the course of an adjudication. This principle applies to the expression of the facts, legal arguments or position in the negotiations.

The relevant passages of Opinion no. (2013) 16 on the relations between judges and lawyers, adopted by the Consultative Council of European Judges (CCJE) on 13-15 November 2013, concern to the principle of dignity and honor of the legal profession, and the integrity and good repute of the individual lawyer: «several ethical principles are common to both judges and lawyers, e.g. compliance with the law, professional secrecy, *integrity and dignity*, respect for litigants, competence, fairness and mutual respect (p. 9); a lawyer shall, while maintaining due respect and courtesy towards the court, defend the interests of the client honourably and fearlessly without regard to the lawyer's own interests or to any consequences to him-or herself or to any other person. A lawyer shall never knowingly give false or misleading information to the court» (p. 20) [5].

The issues of honesty by lawyers are highlighted in ECHR's judgments. Thus, in the Court's view, a careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof. It is impossible to prove the truth of value-judgments and it violates the freedom of expression, which is a fundamental part of the right guaranteed by article 10 of the Convention (*Lingens v. Austria, July 8, 1986, Series A, № 10, § 46); Oberschlick v. Austria (№ 1), May 23, 1991, Series A, № 204, § 63); De Haes and Gijsels v. Belgium, February 24, 1997, Reports 1997-I, § 42*). «In order to distinguish between a factual allegation and a value judgment it is necessary to take account of the circumstances of the case and the general tone of the remarks, bearing in mind that assertions about matters of public interest may, on that basis, constitute value judgments rather than statements of fact» (*Brasilier v. France, no.71343/01, § 37, 11April 2006; Paturel v. France, no.54968/00, §37, 22 December 2005, Morice v. France, no. 29369/10, §126, 23 April 2015).* Lawyers cannot, moreover, make remarks that are so serious that they overstep the permissible expression of comments without a sound factual basis *(A v. Finland(dec.), no. 44998/98, 8 January 2004; Morice v. France, no. 29369/10, §126, 23 April 2015),* nor can they proffer insults (Coutant v. France(dec.), no.17155/03, 24 January2008). However, the pursuit of a just balance between the right to freedom of expression and professional ethics must not result in avocats being discouraged, for fear of disciplinary sanctions, from making clear their beliefs on such occasions *(Ezelin v. France, no. 11800/85, §52, 26 April 1991*).

Analyzing the problem of adherence to the principle of honesty and good repute, one should agree that «the growing public disquiet about lawyer ethics is not mainly because people think lawyers neglect their professional standards. Rather, the main problem is the belief among lawyers that the duty of loyalty to clients requires a lawyer to mislead. Specifically, the ethical duty of confidentiality and the ethical duty of zealous advocacy are interpreted together to mean that lawyers must conceal some facts («confidentiality») while forcefully asserting others. This mis-coupling of these two key ethical duties has an inevitable tendency to produce a kind of partial-truth advocacy in which the lawyer knowingly distracts attention from the truth and fosters misconceptions in the minds of jurors and others. In the end, lawyers frequently succeed in creating false impressions or discrediting the truth and, as a result, people feel they cannot trust lawyers to be straight. Distrust of lawyers is not, however, just an image problem of an insular profession. Our basic civic order relies on the legal system and public respect for it. If the public cannot trust the lawyers who are entrusted with the legal system, there is a problem that casts a shadow on the integrity of the very concept of rule of law» [6, p. 1].

The draft Law of Ukraine «On Amendments to the Law of Ukraine «On Bar and Legal Practice» on the Rights of Advocates in Disciplinary Proceedings» dated May 16, 2019, № 10299, proposed a norm according to which «the grounds for bringing a lawyer to disciplinary liability is the commission of a disciplinary offense during a legal practice» [7]. It is impossible to support such a proposal on the basis that the lawyer's duties are not limited to the faithful performance of the contract with the client. Confidence in the profession of lawyer is also associated with the requirement of a respectable reputation of lawyers.

From the ECHR's judgment in the case of Lecavičiene v. Lithuania, it is possible to conclude how the ECHR evaluates the notion of high reputation of a lawyer. The ECHR underlined, that «higher standards were applicable to advocates, as only persons of untainted reputation could participate in the justice system without discrediting it. Therefore, when evaluating an advocate's conduct it was not sufficient to have regard only to whether the person obeyed the law. It was also pertinent to see a person's behaviour in the context of the legal norms that regulate the ethics of the advocates'profession» *(Lecavičiene v. Lithuania, no. 48427/09, § 14, 27 June 2017)*.

Thus, the high moral reputation of a lawyer is a prerequisite for professional activity. The bounds of admissible actions of lawyers, based on the practice of the ECHR, lie in the usual restrictions on the conduct of members of the Bar, as reflected in the ten basic principles enumerated by the CCBE for European lawyers, with their particular reference to dignity, honour and integrity. This is due to the fact that ethical categories are determined by the nature, tasks and functions of the Bar.

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HLOVIUK I. V.

National University «Odesa Law Academy»,
Head of the Department of Criminal Procedure,
Doctor of Law, Associate Professor

MARCHENKO T. YU.

National University «Odesa Law Academy»,
Post-Graduate Student of the Department of Criminal Procedure

THE PROBLEM OF ACCESS TO THE RESULTS OF COVERT INVESTIGATIVE (DETECTIVE) ACTIONS: THE ECtHR CASE-LAW OVERVIEW AND NATIONAL ASPECT OF THE ISSUE

The following theses are devoted to research of the problem of access to the results of covert investigative (detective) actions in Ukraine through the ECtHR case-law overview. Based on the results of the research the key amendments to the Criminal Procedure Code of Ukraine were suggested.

Key words: *adequate facilities, European Court on Human Rights, covert investigative (detective) actions, access to case file, case law*.

One of the most important principle in criminal justice is that measures applied for the protection of victims and witnesses must be consistent with the rights of the accused. Article 6 (3) b of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as

Convention) guarantees that every accused shall have «adequate facilities» to prepare his/her defence. It includes, inter alia, access to documents and evidence that the prosecution intends to use against the accused in court as well as any exculpatory evidence that would assist accused and his / her legal counsel in the defence. The case materials access issue directly affects compliance of the fundamental principles of equality of arms and proportionality.

In the criminal proceedings of Ukraine the above is of particular importance in the aspect of access to the results of covert investigative (detective) actions, access to which should be considered based on ECtHR case law on the disclosure of case file in the light of the above principles.

Despite the general rule providing that the prosecution authorities shall disclose to the defence all material evidence in their possession for or against the accused (Rowe and Davis v. the United Kingdom [GC], § 60), the European court of human rights (hereinafter referred to as ECtHR) not once emphasized that this right of the accused is not absolute and might be restricted.

For instance, in Dowsett v. the United Kingdom case (App no 39482/98) [1] the Court found the violation of Article 6(1) in conjunction with Article 6(3)(b) of the Convention. The applicant alleged that his right to a fair trial was violated when the prosecution decided, without notifying the judge, to withhold certain relevant evidence on grounds, inter alia, of public interest immunity (para 44). The ECtHR stated that in any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or to keep secret police methods of investigating crime, which must be weighed against the rights of the accused. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1 of the Convention. Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (para. 42). In any case, in systems where the prosecuting authorities are obliged by law to take into consideration both the facts for and against the suspect, a procedure whereby the prosecuting authorities themselves attempt to assess what may or may not be relevant to the case, without any further procedural safeguards for the rights of the defence, cannot comply with the requirements of Article 6 § 1 (Natunen v. Finland, §§ 47-49; Matanović v. Croatia, §§ 158, 181- 182) [2, p. 132/109, para 151].

Moreover, in many cases where the evidence in question has never been revealed, it would not be possible for the Court to attempt to weigh the relevant interest involved against that of the accused without having sight of the material. It must therefore scrutinize the decision-making procedure to ensure that, as far as possible, it complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused (Dowsett v. the United Kingdom) [2,p. 132/109, para 153].

In the case of Yakuba v. Ukraine (App. no 1452/09) [3] Court referred to the case of Leas v. Estonia (App. no no. 59577/08), and stated that failure to disclose to the defence material evidence which contains such particulars as could enable the accused to exonerate himself or have his sentence reduced would constitute a refusal of facilities necessary for the preparation of the defence, and therefore a violation of the right guaranteed in Article 6 § 3 (b) of the Convention.

In addition, Court determined that counterbalancing factors to compensate for the handicap under which the defence labored were not sufficient. As for non-disclosure of the video recording and its treatment by the domestic courts, the Court pointed out that procedure was such, that it permitted the prosecution to determine the meaning of that incriminating material outside of any scrutiny, not only by the defence but also by the domestic courts. The summary of the video used in the proceedings was prepared by the investigator rather than by an independent party under judicial supervision. The domestic courts showed no consideration for the interests of the defence, and based the applicant's conviction, in part, on undisclosed material which the prosecution alone was allowed to see and the meaning of which the prosecution was allowed to determine outside of any control (para 51). The above considerations were sufficient for the Court to conclude that the proceedings overall were not fair.

In aforementioned case of Leas v. Estonia [4] the applicant argued that he had not been given access to the totality of the information gathered as a result of the application of the surveillance measures. In his submission, access to the surveillance information had been required, firstly, since the defence wished to make its own choice of evidence to be relied on in the criminal proceedings, in addition to the choice made by the prosecutor. Secondly, access to the surveillance information would have allowed the defence to assess whether it had been obtained lawfully, that is to challenge the admissibility of the evidence adduced by the prosecution (para 72).

The foregoing positions of the Court clearly indicate that the right of access to the case file is not absolute. At the same time, the prosecution and the court should maintain a balance between the rights of the defence and the prosecution, should properly assess the case file provided to the defence from the perspective of its sufficiency. This in turn will indicate compliance with the principle of equality of arms and proportionality in case of file access issues.

The application of Art 255 (right of a prosecutor by his decision to destroy materials of covert investigative actions if he does not recognize them necessary) in conjunction with Art. 290 of the Criminal Procedure Code of Ukraine (hereinafter referred to as CPC of Ukraine) frequently causes the violation of right to have adequate facilities (access to the results of the covert investigative (detective) actions) for the accused and his legal counsel to prepare for the defence where it should be applicable. Under p. 2 of Art. 290 of the CPC of Ukraine provides that a prosecutor or an investigator under his authority is obliged to give access to the materials of the pre-trial investigation which is at his disposal, including any evidence which, by themselves or in combination with other evidence, can be used for proving the innocence or a lesser degree of guilt of the accused, or facilitating the mitigation of punishment.

It follows from the above legal norms that the prosecution is entitled to decide on the fortune of the results of the covert investigative (detective) actions that may potentially be the materials helping the defence to prove their position in case.

For this reason it is highly important to reconstruct both of the aforementioned articles of the CPC of Ukraine to provide an appropriate mechanism for balancing of public interest in the detection of criminal offenses, preserving the confidentiality of information about secret operations and the interest and the right of the suspect and accused to have adequate facilities for the defence.

In view of the above, the following amendments [5, pp. 54-56] are required:

- the preservation of the results obtained by the covert investigative (detective) actions should be ensured till the entry into force of a court decision that resulted in criminal proceedings or the decision to close the criminal proceedings (amendment to art. 255 of the CPC of Ukraine).
- part 2 of Art. 290 should be agreed with the Art. 255 of the CPC of Ukraine; in case of the amendment of the wording of Part 1 of Art. 255 of CPCs of Ukraine the prosecution will be obliged to provide access to results of covert investigative (detective) actions.
- a judicial procedure to decide on the need to disclose these results of covert investigative (detective) actions should be provided. For this reason in Part 5 of Art. 290 of CPC of Ukraine the legislator should formulate the powers of the investigating judge / the court to carry out a test on the need to disclose the above results [5].

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LAGUTINA I. V.

National University «Odesa Law Academy»,
Head of the Department of Labour Law and Social Security Law,
Doctor of Law, Professor

PROTECTION OF LABOUR RIGHTS IN THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Key words: *European Court of Human Rights, labour rights, eComms, employee, Online Platform.*

The case law of the European Court of Human Rights demonstrates the growing importance of labour rights.

The European Court of Human Rights has become a unique international body of justice, whose purpose is to increase the legal protection of the individual and the extension of the rights of the individual. For the first time an individual was granted the right to sue the state for the restoration of the violated right by filing an appeal to an international court. Recognizing the jurisdiction of the European Court in the system of an international mechanism for the protection of human rights, the state proceeds from the priority of international law over national law.

At least a violation of the three articles of the Convention for the Protection of Human Rights and Fundamental Freedoms can be a reason for applying to the European Court of Human Rights: article 4 (Prohibition of slavery and forced labour), article 8 (Right to respect for private and family life), article 11 (Freedom of assembly and association).

The list of possible violations of the Convention that may be subject to review by the European Court of Human Rights is not exhaustive. Other violations may also be grounds for appeal to the specified court in order to protect the violated rights in the field of labour relations.

Turning to the practice of the European Court in the field of discrimination, it is worth highlighting that the actual disputes about discrimination in labor or social security relations are rare. Art. 14 of the European Convention prohibits discrimination, but applies only to the rights listed in the convention itself.

The court defines discrimination as a different appeal to people who are in the same situations without objective and reasonable justification. In addition, in the decision on the case of Thlimmenos v. Greece [1]. The court found that the refusal of the state «to treat persons whose situations differ significantly» is also considered to be discrimination.The difference in treatment, as the first criterion of discrimination, is revealed by the Court by comparing it with the position of others in a similar situation. For such a comparison, an important factor is to establish the similarity of situations in which the compared persons are located. The rule of distribution of the burden of proof in discrimination cases is one of the important provisions in the practice of the European Court, which ensures the greatest effectiveness in handling such cases. According to the case law of the ECtHR, in the event that the applicant has proved the difference in the appeal, the respondent State must prove that this difference was justified and does not constitute discrimination6.

The practice of dealing with cases of indirect discrimination in the practice of the ECHR should be particularly interesting for lawyers, since this category is absent in jurisprudence. According to the interpretation of the International Labour Organisation, the Convention No. 111 on discrimination in the field of labour and occupation applies to both direct and indirect discrimination. Thus, it is theoretically possible to claim judicial protection against indirect discrimination on the basis of the provisions of the ILO Convention No. 111, appealing to the legal positions of the ECHR. It is obvious that the European Convention does not contain rules on the procedure or grounds for termination of an employment contract. At the same time, the European Court in some cases recognized the dismissal of employees as contrary to the Convention, relying on the norms of art. 8 on the protection of private and family life (Obst v. Germany [2], Lustig-Prean and Beckett v. United Kingdom [3]), Art. 9 on religious freedom (Eweida and Others v. The United Kingdom [4]), Art. 10 on freedom of thought (Vogt v. Germany [5]), Art. 11 on freedom of assembly (Palomo Sánchez a.o. v. Spain [6]), often in conjunction with Art. 14 on the prohibition of discrimination.

After a long (from 2016) testing on individual users of the electronic document exchange system, the European Court of Human Rights finally opened it to all applicants. What is the new eComms service? eComms (ECHR Electronic Communication Service) is a service implemented by the ECHR for electronic communication with representatives of applicants. It is activated only after communication (that is, acceptance) of the complaint, when it goes to the production stage and the respondent government must provide comments [7].

The essence and convenience of the system is that person can submit (upload) procedural documents from it: denial, requirements, other documents, without sending correspondence in paper form.

Undoubtedly, the key advantage in this is saving time on sending and receiving documentation with instant confirmation of receipt.

Now all the courts of Ukraine are actively implementing the so-called «Electronic Court» project in their work in order to simplify citizens' access to information about the progress of the case in court, the exchange of documents between the participants in the case and the court.

It is important to underline that more than half of all applications filed with the Court since its inception concerning violations of Article 6 of the Convention, which deals with a fair trial within a reasonable time. 58% of the violations found by the Court concern or Article 6 (right to a fair trial), or Article 1 of Protocol No1 (protection of property rights).

The uniqueness of this mechanism is due to the fact that, in contrast to legal systems with classical case law, the European system of human rights protection is constantly adapting to novelties in public relations. The Convention, as repeatedly noted in ECtHR decisions, is a living mechanism, constantly evolving, which constantly has to overcome the tension between legal certainty, consistency of interpretation and new circumstances.

For instance, European Court limits employers' right to monitor employees' email. The European Court of Human Rights ruled that companies can monitor their employees' email if they are notified in advance, giving shape to a rapidly evolving area of the law at the intersection of technology, privacy and employees' rights.

In doing so, judges are scaling back a previous ruling that had stirred unease in Europe, where privacy is viewed as a fundamental right. That earlier decision had taken a similar approach to existing law in the United States, which gives companies wide-ranging powers to monitor workplace communications.

The latest decision, by the Grand Chamber of the European Court of Human Rights, provides more protection by requiring companies to inform workers of their policies. Judges also urged European governments to establish safeguards against abuse, and said that businesses should consider using forms of monitoring that avoid infringing on an employee's privacy [8].

It is important to evaluate that national legal systems and the European system of human rights protection should cover legal regulation of such a category of employees as employees in the online platform economy.

Online platforms position themselves as intermediaries that match demand and supply of labour, putting in contact workers and clients. Clients – whether physical persons or companies – can post tasks, while workers can find those tasks that correspond best to their skills and their availability for doing work. As there are no boundaries in the online world, online platforms allow clients to reach out to a global workforce.

From a regulatory perspective, platform labour represents a «moving target» [9]. Another noteworthy fact in this context is that Ukraine ranks first in the world in «IT freelance». It is estimated that at least 3% of the Ukrainian workforce is involved in online work.

Online work is available to Ukrainian workers through over forty different platforms.

It should be noted that the key challenge associated with online work is that workers executing tasks through such platforms are treated as «freelancers», or «independent contractors», in other words, as self-employed persons providing services or goods. Thus, the vast majority of workers do not fall into the scope of the labour and social security law. Moreover, platform workers providing digital (online) work are firstly exposed to all the known hazards related to work with computers, such as visual fatigue and musculoskeletal problems. Again, as is the case with physical work, these risks are elevated for online platform workers, especially because of the time pressure under which they tend to work. The fact that the work is carried out independently at home, making use of the workers' own equipment, may furthermore mean that this equipment does not meet ergonomic criteria, that the seating and work surfaces do not guarantee correct posture and that other environmental factors are not optimised for working (lighting, temperature, humidity, air quality, etc.) [10]. Finally, other potential risks include technostress, technology addiction, information overload, burn-out, permanent exposure to electromagnetic fields, postural disorders and cyber-bullying [11].

Clearly, there is scope for an explicit governmental policy to fully unleash the potential from digital work for the Ukrainian society, and also to make it sustainable. Such policy can first and foremost aim at facilitating the formalization of the activity of Ukrainian online workers, and legalizing their incomes from the platforms, in line with the ILO Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204).

Thus, the legal regulation of the peculiarities of the regulation of the work of digital employees, platform employees in the draft Labour Code of Ukraine is necessary in order to ensure observance, promotion and implementation of the fundamental principles and rights in the field of labour, as well as personal non-property rights and property rights of employees.

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TERLETSKYI D. S.

National University «Odesa Law Academy»,
Acting Head of the Department of Constitutional Law,
PhD in Law, Associate Professor

CONSTITUTIONAL COMPLAINT IN UKRAINE AS A REMEDY TO BE EXHAUSTED UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

These theses consider the potential of the constitutional complaint in Ukraine to be an effective legal remedy.

Key words*: constitutional complaint; Constitutional Court of Ukraine; European Court of Human Rights case law.*

The practical impact of introduction of a constitutional complaint – a new secondary and exclusive legal remedy for constitutional rights and freedoms of a person in Ukraine – under the constitutional reform of the legal system in 2016 is only just becoming analysed by the expert community [1-2]. This is primarily due to the simple, though unacceptable, fact that the Constitutional Court of Ukraine has managed to pass a single decision in a case on a constitutional complaint almost three years after the amendments to the Constitution of Ukraine came into force [3].

At the same time, among the variety of issues that need to be analysed, there is at least one which Ukrainian lawyers have *a priori* addressed in overly optimistic manner despite its obvious complexity. This is about the ability of a constitutional complaint to be an effective legal remedy, which must be resorted to prior to appealing to the European Court of Human Rights.

When considering these standpoints [4-5], it should be noted first and foremost that they reflected conceptual views on the expected legislative regulation of conditions, procedure and impact of exercising the right to file a constitutional complaint in Ukraine. At the same time, it was about speculations that had the nature of *de lege ferenda* and *de sententia ferenda*, accordingly, even after adoption of the relevant amendments to the Constitution of Ukraine.

Possibly because of momentum, after adoption and entry into force of the Law of Ukraine «On the Constitutional Court of Ukraine», some authors stated that

If the constitutional complaint is used at full capacity, it will surely reduce the number of applications filed to the ECtHR, substantially strengthening the national judicial system and improving human rights protection [6].

The latter statement is premature and erroneous since, first of all, the Law of Ukraine «On the Constitutional Court of Ukraine» does not *de lege lata* contain and cannot contain provisions that would give undeniable grounds for this. In order to determine whether the constitutional complaint model introduced in Ukraine provides for acceleratory and compensatory aspects of the protection of the constitutional defined rights and freedoms, which is critical for its identification as a national «filter» on the way to the European

Court of Human Rights according to the Venice Commission [7, §92], it is clearly not enough to analyse only provisions of the special Law. Other related provisions of the national legislation, in particular, procedural legislation, and, to a certain extent, the relevant law enforcement practices should be analysed as well. This systematic approach is applied by the European Court of Human Rights in determining the effectiveness of a remedy in case of doubt [8, §157; 9, §98].

It is essential that the remedy before the constitutional court guarantee effective decision making [10, P. 49]. Where a court finds itself unable to reach a decision, whether because of a lack of safeguards against deadlock or their failure, the consequence is to «[restrict] the essence of [the] right of access to a court… [and to deprive] an applicant of an effective right to have his constitutional appeal finally determined» [11, §119-123].

In this context, the current practice of the Constitutional Court of Ukraine regarding considering constitutional complaints can hardly be interpreted as proof of its practical effectiveness. In particular, practical implementation of the acceleratory aspect of protection of the rights and freedoms of a person of the constitutional complaint model introduced in Ukraine proves that it is currently a matter of extraordinary exception, since the Constitutional Court of Ukraine has used measures to secure a constitutional complaint only once so far [12].

Given the failure of Ukraine to perform its positive obligation to legislatively regulate the conditions and procedure for reimbursement of damage caused by unconstitutional acts and actions as well as very controversial judicial practice due to this fact, an assessment of the effectiveness of the compensatory aspect is an even bigger challenge [13].

This does not mean, however, that where a constitutional court is empowered only to find a violation and nullify the impugned act, the constitutional complaint procedure is inevitably ineffective as a remedy under Article 13 of the Convention. A «two-step» approach, whereby the complainant may request that the procedure in his/her case before the lower court be reopened or otherwise revised in accordance with the principles set out in the constitutional court judgment finding a violation, may constitute an effective remedy [10, P. 50].

Based on the above, it can be concluded that only the law enforcement practice of Ukrainian courts regarding the revision of court cases, in which unconstitutional laws of Ukraine were applied, can provide convincing arguments as to the remedial effectiveness of the constitutional complaint.

But even for any given country a constitutional complaint may be an effective remedy for some Convention violations, whereas according to the Strasbourg Court's case-law, it may not be effective for other violations. In particular, a distinction has to be made between cases of alleged excessive length of proceedings and violations of «other» human rights [7, §88].

At the same time, it should be borne in mind that only the European Court of Human Rights has the authority to give a final assessment of effectiveness of the constitutional complaint in the context of a particular case, which will undoubtedly have far-reaching consequences. At least, it was the meaning of the judgement of the European Court of Human Rights in *Uzun v. Turkey* [14] in a similar case.

That is why it is only the European Court of Human Rights which (after examining closely the accessibility of the remedy, the modalities for its exercise, the remedial powers of the Constitutional Court of Ukraine, and the legal effects of its decisions) could give a final assessment.

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KOVALCHUK S. O.

National University «Odesa Law Academy»,
Head of the Criminal Process and Criminalistics Department of Ivano-Frankivsk Law Institute, Doctor of Law, Associate Professor

LAWFULNESS AS THE MAIN REQUIREMENT FOR PROPERTY RIGHTS INTERFERENCE IN CRIMINAL PROCEEDINGS: LEGAL POSITION OF THE EUROPEAN COURT OF HUMAN RIGHTS

The article is devoted to the research of the legal position of the European Court of Human Rights regarding the definition of the content of lawfulness as the main requirement for interference in the property rights to the material objects, seized as material evidences in criminal proceedings.

Key words: *lawfulness, interference in the property rights, criminal proceedings, material evidences, European Court of Human Rights.*

The results of the research of the practice of the ECHR indicate that the conditions of lawfulness for interference in the property rights, to which the Court makes an assessment, are: 1) the compliance of the requirement of lawfulness; 2) the existence of a general (public) interest, which interfered the interference in the property rights; 3) the ensuring a fair balance between the requirements of general (public) interest and the protection of property rights.

The compliance of the requirement of lawfulness implies that interference in the property rights, including in connection with the implementation of criminal proceedings, must be prescribed by law and not be arbitrary. In the practice of ECHR, lawfulness is defined as the main requirement for interference in the property rights. Thus, the Court has repeatedly emphasized that the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful (§ 58 of judgment from 25.03.1999 in the case of Iatridis v. Greece, § 167 of judgment from 23.01.2014 in the case of «East/West Alliance Limited» v. Ukraine) [1; 2].

In accordance with the legal position of the ECHR, the decision of the issue of the lawfulness of state's interference in the property rights is preceded by the decision of the issue of ensuring a fair balance between the requirements of general (public) interest and the protection of property rights. In particular, the Court points out that issue of whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights only becomes relevant once it has been established that the interference in question satisfied the requirement of lawfulness and was not arbitrary (§ 33 of judgment from 24.03.2005 in the case of Frizen v. Russia, § 42 of judgment from 24.05.2007 in the case of Viktor Konovalov v. Russia, § 31 of judgment from 06.11.2008 in the case of Ismayilov v Russia) [3; 4; 5]. In case of recognition of the interference illegal in the meaning of Article 1 of Protocol No. 1, the Court states that there is a violation of this norm and concludes that it unnecessary to examine whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (§ 36 of judgment from 24.03.2005 in the case of Frizen v. Russia, § 46 of judgment from 09.06.2005 in the case of Baklanov v. Russia) [3; 6].

Determining the content of lawfulness as the main requirement for interference in the property rights, the Court in the case of «East/West Alliance Limited» v. Ukraine notes that the requirement of lawfulness in the understanding of the Convention requires compliance of the relevant provisions of national legislation and matching to the principle of the rule of law, including freedom from arbitrariness (§ 167 of judgment from 23.01.2014) [2]. Thus, state's interference in the property rights is recognized by the Court as lawful in the event of its implementation on the basis of law, in accordance with the procedure established by it and in accordance with the principle of the rule of law. Summarizing the legal positions, outlined in judgments from 09.11.1999 in the case of Spacek s.r.o. v. the Czech Republic and from 05.01.2000 in the case of Beyeler v. Italy, ECHR in the case of Baklanov v. Russia and in the case of Shchokin v. Ukraine indicates that when speaking of «law», Article 1 of Protocol No. 1 alludes to the same concept to be found elsewhere in the Convention. This concept requires firstly that the impugned measures should have a basis in domestic law. It also refers to the quality of the law in question, requiring that it be accessible to the persons concerned, precise, and foreseeable (§ § 40 – 41 of judgment from 09.06.2005, § 51 of judgment from 14.10.2010) [6; 7]. Regarding the rule of law, in the practice of the Court it is defined as one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention and entails a duty on the part of the State or other public authority to comply with judicial orders or decisions against it (§ 58 of judgment from 25.03.1999 in the case of Iatridis v. Greece, § 33 of judgment from 24.03.2005 in the case of Frizen v. Russia) [1; 3].

The analysis of the practice of the ECHR allows to assert that the assessment of the lawfulness of state's interference in the property rights during criminal proceedings is provided by the Court in terms of compliance by the national courts of the grounds and procedures for limitation and deprivation of property rights, which enshrined by norms of the criminal procedural law. In particular, the subject of assessment of the ECHR in specific cases was: 1) the lawfulness of the seizure of material evidences during the investigative actions and their accession to a criminal case (§ 56 of judgment from 07.06.2007 in the case of Smirnov v. Russia, § § 177 – 181 of judgment from 23.01.2014 in the case of «East/West Alliance Limited» v. Ukraine) [2; 8]; 2) the lawfulness of the imposition of seizure on property during criminal proceedings (§ 38 of judgment from 18.07.1994 in the case of Vendittelli v. Italy) [9]; 3) the lawfulness of the imposition of seizure on property during criminal proceedings and the use of special confiscation as a way of resolving of the fate of material evidences (§ 51 of judgment from 24.10.1986 in the case of Agosi v. United Kingdom, § § 27 i 30 of judgment from 22.02.1994 in the case of Raimondo v. Italy) [10; 11]; 4) the lawfulness of the use of special confiscation as a way of resolving of the fate of material evidences, belonging to the applicant, including the money that was subject to smuggling (§ § 42 – 46 of judgment from 09.06.2005 in the case of Baklanov v. Russia) [6] and the property of the applicants, acquired inappropriately and inexplicably in what way (§ 98 of judgment from 12.05.2015 in the case of Gogitidze and Others v. Georgia) [12]; 5) the lawfulness of the use of special confiscation as a way of solving of the fate of material evidences to the property of third persons (§ § 28 i 29 of judgment from 24.03.2005 in the case of Frizen v. Russia, § 74 of judgment from 15.01.2015 in the case of Veits v. Estonia) [3; 13].

Recognizing the state's interference in the property rights is unlawful, the Court states a fact of violation of Article 1 of Protocol No. 1. At the same time, the conclusion about the illegality of state's interference in the property rights is based not only on the absence of grounds for the interference in the property rights in the national criminal procedure law, but also on the «insufficientness» of the criminal procedural law itself, which is its inaccessibility for the interested persons, the fuzzy formulation of the definition of the grounds for the application of one or another measure of state's interference in property rights during criminal proceedings or unpredictability in their application. In particular, in the case of Smirnov v. Russia the Court expressed doubts that a broad discretion regarding the maintenance of material evidences in a criminal case that was provided to an investigator by the CCP of the Russian Federation and was not accompanied by efficient judicial supervision would pass the «quality of law» test (§ 56 of judgment from 07.06.2007) [8]. In the case of Baklanov v. Russia, having regard to the national courts' lack of reference to any legal provision as a basis for the forfeiture of an important sum of money and to the apparent inconsistencies of case-law compared to the national legislation, the Court considers that the law in question was not formulated with such precision as to enable the applicant to foresee, to a degree that is reasonable in the circumstances, the consequences of his actions (§ 46 of judgment from 09.06.2005) [6].

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AKIMENKO Y.

National University «Odesa Law Academy»,
Associate Professor at the Department of International and European Law,
PhD in Law, Associate Professor

THE EUROPEAN CONVENTION ON HUMAN RIGHTS AS A TOOL OF PROTECTION OF LEGAL PERSONS

The article is devoted to the recognition of The European Convention on Human Rights as a tool of protection of interests of legal entities in the European Court of Human Rights, as well as any other individual.

Key words: *European Court on Human Rights, legal persons, the right to a fair trial.*

Both domestic law and international law are increasingly coming to recognize corporations, other private non-natural persons and even public juristic entities as subjects of criminal liability. A significant question for theory and practice is whether such private or public legal entities can find direct protection under international fundamental human rights norms when criminal law and criminal procedure are being applied against them.

Moreover, if this is not the case, then a second issue merits attention *to* indirect protection of legal persons: is it possible for individual stakeholders in these entities – such as owners, shareholders, employees, and members – to invoke the protection of human rights when the violation is in fact directed against the organization in which they have an interest? The outcome of an assessment of these questions is not only relevant to legal person themselves, it has also consequences for the natural individual stakeholders of the entity, as well as for democratic society and the rule of law.

There is a growing awareness that legal persons are responsible for human rights violations in the world. This responsibility not only concerns gross, large-scale human rights violations by multinational companies in developing countries, it also includes all kinds of more or less separate breaches of human rights by all sorts of entities throughout the world. For example, a public legal entity seriously discriminates against ethnic or religious groups, a company uses slaves or produces inferior food products or medicines that cause people to die or become seriously ill, a newspaper violates individuals' right to privacy, a political party propagates hate speech, or an internet provider permits incitement to violence on sites it hosts.

The European Convention on Human Rights was a direct response to the grave human rights abuses during World War II. The Convention is a multilateral treaty signed in Rome on November 4, 1950. All forty-seven member States of the Council of Europe – thus including Ukraine – are parties to the Convention. The Convention's binding character is clearly stated in its first article which says that all member States of the Council of Europe shall secure to everyone within their jurisdiction the rights and freedoms defined in the Convention. The difference between the Convention and other international human rights instruments (such as the International Covenant on Civil and Political Rights) is that the Convention confers a broad protection to corporations in addition to individuals.

Under Article 34 ECHR it is possible for corporations and other private legal persons to summit cases on their own behalf to the European Court of Human Rights (ECtHR). In order to be admissible in a complaint the plaintiff must qualify as a victim. This means that the legal person must be directly affected by the act or omission in issue. So the ECHR does not allow for that, although only Article 1 First Protocol ECHR on the right to property expressly recognizes legal persons as recipients of fundamental rights, several of the other human rights in the European Convention are granted to them as well. This also applies to rights that are relevant to criminal justice. That rights seem to refer to natural persons, since they include terms as "anyone has the right". The ECHR always intended to include corporate entities and other non-natural persons. Referring to its constant case law that the European Convention is a living instrument which must be interpreted in the light of present-day conditions, the European Court of Human Rights (ECtHR) even manages to expand the protection of legal persons, notably corporations, under the Convention.

This might also apply to private legal persons caught in the criminal justice system. Nevertheless, this still does not mean that corporations and suchlike entities enjoy exactly the same protection under the rights as are applicable to them as individuals. All the same, private legal persons do have standing under the European Convention and they can claim to be victim of the human rights relevant to them. This harmonizes fairly well with the aim of the Convention as presented in its preamble, which emphasizes the value of human rights for maintaining and developing the rule of law as well as peace, unity and justice in Europe, rather than that human rights require protection because their basis lies in ideals of humanity and the value of human beings and humankind. An additional argument for the European Court is that in many cases it is not possible to draw distinctions between professional and non-professional activities. Nevertheless, legal persons that are in fact principally criminal organizations might be excluded from the protection that non-criminal organizations enjoy under the Convention.

Meanwhile, governmental organizations may in principle not submit individual complaints to the European Court, nor do the rights and freedoms embodied in the European Convention and Protocols apply to them. It is, however, not always evident if a legal person should qualify as a governmental or non-governmental organization. In some cases legal entities that formally had to be considered as public legal persons (public law entities) were regarded as non-governmental organizations within the meaning of the Convention, because their objectives and powers were not such as to enable them to be classed with governmental organizations established for public-administration purposes. The European Court's jurisprudence reveals that public-law entities, such as governmental bodies or public corporations, can have the status of a non-governmental organization insofar as they do not exercise governmental powers, were not established for public-administration purposes and are completely independent of the State. Private legal persons, such as public companies that participate in the exercise of governmental powers or run a public service under government control will rank as governmental organizations. In common with normal public legal persons, such public companies cannot derive protection within the international supervisory system from the rights embodied in the European Convention.

Companies and other private legal persons charged with a criminal offence are subject to the protection of the right to a fair trial in Article 6 ECHR [1]. The extensive case law of the European Court does not seem to include a single case in which the ECtHR rejected a legal person's fair trial complaint because the claimant was a company or other private juridical entity[2]. What is more, when assessing a criminal case against the fair trial requirements, the Court does not at all appear to take into consideration whether the claimant is an individual or a legal person. In, for instance, the case of *Fortum Oil and Gas Oy versus Finland* the Court assumes that Article 6 applies to criminally charged legal persons in the same way as it does to charged individuals [3]. Interestingly, Fortum Oil and Gas Oy is a multinational company specializing, *inter alia*, in the wholesale of petrochemical products. So the fair trial requirement might equally apply to natural persons, one-person private organizations and multinational corporations. From the European Convention's case law it is indeed clear that legal persons enjoy wide protection against the criminal justice system under the right to a fair trial.

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BUT I. O.

National University «Odesa Law Academy»,
Assistant Professor of the Department of Civil Process,
PhD in Law

CONSIDERATION OF THE CASE UNDER THE PROCEDURE OF SUMMARY PROCEEDINGS IN THE CONTEXT OF ENSURING THE RIGHT OF A PERSON TO FAIR TRIAL

The research is devoted to hearing of cases under the procedure of summary proceedings as one of the main procedural forms. It indicates justifiability of application and compliance of such a form with the requirements of Art. 6 of the European Convention on the right of a person to fair trial only subject to a number of requirements.

Key words: *summary proceedings, court hearing, right to a fair trial*.

In the wording of October 3, 2017, the Civil Procedural Code of Ukraine (hereinafter referred to as the CPC of Ukraine) introduced the possibility of hearing certain categories of cases (minor cases, cases arising from labor relations, cases of minor complexity and other cases in which priority is given to an expeditious judgment delivery) in the form of summary proceedings.

The list of cases in which hearing under rules of summary proceedings is impossible (cases arising out of family relations, except for disputes regarding recovering of alimony and division of property of spouses; relating to inheritance, relating to the privatization of the state housing facilities; the recognition assets' possession as unjustified and their reclamation; cases relating to the price of claim more than five hundred subsistence minimum amounts for able-bodied persons) has also been established.

The discussion on the expediency of simplifying litigation procedures continued for a long time: Recommendation № R (81) 7 of the Committee of

Ministers of the Council of Europe to member states on ways to facilitate access to system of justice dated May 14, 1981 referred to the need to develop measures in relation to uncontested or non-controversial particulars of a claim in order to obtain expedient delivery of decision, deprived of unnecessary formalities, without need to appear before court in person or excessive expenses [1]. Gradually, this thesis has been recreated and improved in the following advisory acts: Recommendation № R (84) 5 of the Committee of Ministers of the Council of Europe to member states on the principles of civil justice aimed at improving the functioning of justice dated 28 February, 1984 states that the court, at least in the first instance court, is to be given the authority to decide, depending on the nature of the case, and except for the cases where the specified is clearly stipulated by law, whether the proceeding is to be carried out in writing or orally, or in both of these ways [2].

Recommendation № R (95) 5 of the Committee of Ministers of the Council of Europe to member states on the introduction and improvement of the functioning of systems and procedures for appeals in civil and economic cases dated February 7, 1995 also indicates refusal of court hearings, holding of only one hearing or, depending on the circumstances, a preliminary hearing; the implementation of only oral proceeding or only writing proceeding as one of the means of expediting proceedings [3].

However, in the context of the transformation of national legal systems, taking into account the practice of the European Court of Human Rights, it became necessary to «update» ideas on due process of court hearing, which resulted in Opinion № 6 (2004) of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe as to fair trail within a reasonable time and role of judge in court proceedings, taking into account alternative means of resolving disputes dated November 24, 2004 [4].

Thus, in the recent case of «Mirovni Inštitut v. Slovenia» the European Court of Human Rights (hereinafter «the Court») found that there had been a violation of paragraph 1 of Article 6 of the Convention on the right to a fair trial [5]. This case concerned an administrative dispute between a research institute and the Ministry of Education, Science and Sport of Slovenia, which arose in connection with the improper conduct of the tender procedure. As the Court points out in its decision, the institute-applicant clearly requested to hold the hearings at which witnesses' statements as for the errors alleged by the claimant in the assessment of the programs submitted for consideration in the tender procedure could be considered. After the parties exchanged several written documents, the administrative court, without hearing, rejected the statement of claim, detailing in the decision all the extrajudicial proceedings in the ministry, described the materials of both parties, but the motivation of the decision was given by the national court on one page, mainly referring to the materials of the ministry, and, as for the claimant, the court merely did not agree with his position, and quoted the law. Subsequently, none of the evidence relied on by the institute-applicant in its appeal was mentioned in the court's reasoning.

Despite the fact that the possibility of hearing the case without a hearing was provided for by Slovenian national law, the applicant complained to the European Court of Human Rights about violation of paragraph 1 of Article 6 of the Convention in connection with the violation of the right to a fair trial due to the absence of an oral hearing in an administrative court and the absence of arguments in the decision of this court. With regard to this, the European Court of Human Rights noted that during the proceedings in the court of the first and only instance, the right to a «public hearing» within the meaning of paragraph 1 of Article 6, provides for the right to an «oral hearing» unless there are exceptional circumstances justifying the waiver of such a hearing, and in the event of the case hearing in several authorities, at least one authority is to provide the opportunity to hold such a hearing if there are no such exceptional circumstances. The exceptional nature of the circumstances which may justify the refusal of the oral hearing in the proceedings is limited to the nature of the issues dealt with by the competent national court: the European Court of Human Rights has agreed to exceptional circumstances in cases where the proceedings concerned solely legal or specific technical issues, noting that oral hearing may not be hold, if, for example, certain facts are not disputed, and courts may deliver just and grounded decisions on the basis of written materials submitted by the parties.

Thus, despite the existence of a national legislation in the field of the possibility of a case consideration under the procedure of summary proceedings without summoning the parties, national courts should take into account that the refusal to hold an oral hearing may be justified only in certain cases:

1) if there is no dispute about the facts: in this event, cases may have a sign of indisputability, and therefore, in accordance with national legislation, may be considered in a writ or separate proceeding;

2) if a court may consider and resolve the case in just and reasonable manner on the basis of the relevant procedural documents of the parties and other written materials. In some cases, the European Court of Human Rights recognizes that a written procedure may be even more effective than oral hearing (for example, in matters relating to the calculation of tax payments and social benefits when the hearing of a case by court of first instance or an appeal / cassation review concern law matters, but not the facts). Since only in summary proceedings the right of the parties to provide oral explanations is implemented, as well as to involve witnesses in the case for the purpose of obtaining their testimony, the courts are to take into account that the restriction of the parties in this right may lead to a violation of the European Convention norms;

3) if the parties to the case agree with the tacit consent or, in the presence of respective petitions, the case hearing may be fully acceptable without a summons of the parties. At the same time, when at least one of the parties submits petition for an oral hearing, the court has either to exercise this right or to provide reasonable grounds for restricting a person in such a right. However, even the consent (or lack of objections against the summary proceedings) of a person for consideration without summoning of the parties

may not result in the violation of adversarial principle and procedural equality, in disproportional restriction of other procedural rights guaranteed both by national legislation and by the European Convention;

4) 4) in the hearing of the case, at least one authority is to entitle a person the right to an oral hearing, unless there are listed exceptional circumstances. Thus, if a person was refused an oral hearing, it is the court of appeal, which is to "correct: such a mistake, since according to Art. 367 of the Civil Procedure Code of Ukraine, the court of appellate instance is authorized to review the case, taking into account the evidence available in it and additional evidence, and verify the legality and validity of the decision of the court of first instance within the framework of the arguments and requirements of the appeal.

At the same time, when the court of first instance is the only court which decides on the fact, and the court of appellate instance has truncated powers and may review a decision only as for the issue of the application of law (incomplete appeal model), it is the court of first instance which is to exercise such a person's right;

5) since the absence of oral hearings affects not only the parties' ability to provide oral explanations, but also the opportunity for the public and the press to be present in the courtroom, holding a trial without summoning parties shall not be a barrier to maintaining trust in the court, because the public character of hearings protects the parties from the administration of justice secretly, without public scrutiny, and contributes to a fair trial.

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OSTROVSKA L. A.

National University «Odesa Law Academy»,
Associate Professor of the Department of Civil Process, PhD in Law

PROTOCOL 16 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS AND THE FIRST ADVISORY CONCLUSION OF THE EUROPEAN COURT OF HUMAN RIGHTS

Key words: *European Court of Human Rights, source of law, The European Convention on Human Rights, advisory conclusion, Supreme Court.*

On August 1, 2018, Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) entered into force. The Protocol provides the highest courts of its member countries with the right to apply to the European Court of Human Rights (ECHR or the Court) for advisory conclusions on «the fundamental issues of the interpretation and application of the rights guaranteed by the Convention and the protocols thereto».

Today, the Protocol entered into force only for the ten countries that have ratified it. The last of these were Ukraine and France, which ratified on April 12, 2018 [1]. The ECHR has already brought its internal documents in line with the Protocol: a new version of the Rules of Court and Guidelines for the implementation of the advisory conclusion procedure, which was approved by the ECHR Plenum as early as September 18, 2017, were issued [2].

In accordance with the Protocol, the State party itself determines which of the courts in the national legal system will have this right. Ukraine by the Law «On the ratification of Protocols No. 15 and No. 16 to the Convention on Human Rights and Fundamental Freedoms» No. 2156-VIII dated October 5, 2017, has designated the Supreme Court as such. But today in the Verkhovna Rada two bills are considered, which specify the subject of the appeal to the ECHR for the advisory conclusion: the first is the draft law "On amendments to certain legislative acts of Ukraine in connection with the ratification of Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms" No. 8535 dated June 27, 2018, the second – «On Amendments to Certain Legislative Acts of Ukraine in Connection with the Ratification of Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms» No. 8535-1 dated July 06, 2018. The first draft stipulates that the Grand Chamber of the Supreme Court of Ukraine applies to the ECHR, and the other-envisages that the cassation instance may, on its own initiative, decide on an appeal to the European Court of Human Rights with a request for an advisory conclusion. That is, Ukraine has not yet decided who will appeal to the ECHR for providing an advisory conclusion.

What are the issues that the ECHR will consider within the framework of this procedure, and will it be useful for Ukraine? After all, in itself, the concept of «fundamental questions of interpretation and application of rights» is sufficiently broad.

The first request, filed by the Court of Cassation of France on 16 October 2018, stipulated the delisting of the so-called «positive obligations» under Article 8 of the Convention in the field of surrogacy, in particular in cases where the «legal» mother does not have a genetic connection with the child, which gave birth to a surrogate mother. The request is related to the fact that surrogate motherhood is prohibited in France, but some French citizens use services of surrogate mothers abroad (in particular in Ukraine) [3] and appeal to the French authorities to recognize children born of surrogate mothers abroad as their own children. In the case of Menneson v. France [4] and in some cases that followed this precedent, the ECHR has already determined that in some cases the French authorities are required to register such children. In those cases, a person who wanted to be a legal father in France was also the biological father of children. However, new cases violate new, difficult ethical and legal issues, in particular whether the same principle applies to legal motherhood, especially if the person who claims to be registered as a legal mother does not have a biological connection with the child [5]. This request shows that queries of a character will have greater chances to be considered by the Grand Chamber of the ECHR: this is primarily the «new» issue facing the courts of developed countries of the EU: bioethics, data processing, immigration, etc.

On April 10, 2019, the ECHR provided the Cassation Court of France with its first advisory conclusion. The ECHR has determined that if a person is designated as a mother in accordance with the legislation of a foreign country (that is, outside of France), Article 8 of the Convention provides for the obligation for the French authorities to provide for a mechanism by which such a woman would be able to be recognized as a mother France However, this recognition does not necessarily have to be automatic: this can also be done through the adoption process [6].

As to the procedural aspect of this conclusion, according to the judge of the ECHR, Hanna Yudkivska, «The court seized the opportunity to determine the boundaries of advisory conclusions: it confirmed that it has no jurisdiction to assess the facts of the case or the views of the parties on the interpretation of national law in the light of the Convention, nor for a decision on the outcome of the national proceedings. His role is limited to giving his conclusion on the questions raised, and the requesting court makes its findings based on the Court's conclusion on the relevant provisions of national law and the outcome of the case. Moreover, the Court's conclusion should be limited to matters directly related to ongoing national proceedings» [7].

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POPELYUK V. P.

National University «Odesa Law Academy»,
Associate Professor of the Department of Economic Law and Procedure,
PhD in Law

TO THE QUESTION OF RES JUDICATA FINALITY PRINCIPLE IN THE PRACTICE OF COURT JUDGEMENTS IN EUROPEAN COURT OF HUMAN RIGHTS PRACTICE

Key words: *res judicata, legal certainty, finality of decisions, court.*

Principle res judicata – finality of court judgement is approved in the international level and guarantied by clause 1 of the Article 44 of the Convention of human rights and principal liberties [1]. Principle of judgement finality is the basic part of the supremacy of law and legal certainty principle. On its essence principle res judicata is a solved case (res judicata pro veritate habetur –court judgement is to be considered as the truth) it means the finality of court judgement which is in force and it cannot be revised. Res judicata origin is even in ancient Roman judicial procedure, which history is determined by three periods: 1) legis actions (legis actio procedure), 2) actiones per for mulas (formulary procedure), 3) extraordinary procedure [2, p. 114].

According to Articles 129, 129-1 of the Constitution of Ukraine the judge administrating justice is independent and is ruled by supremacy of law. Court renders judgement in the name of Ukraine, court judgements are obligatory to be fulfilled [3]. That's why guarantee of justice in the relationships between legal subjects is possible by the right to judicial protection and by tools which guarantee real force of court judgements. As far as only judicial act passing by which fact of breaking rights of a certain person is determined and the responsibility on fulfilling certain actions is put on the person who let this delinquency, it would be senseless if fulfillment of such act wasn't guaranteed by law enforcement procedure.

In accordance with Article 17 of Law of Ukraine «On fulfillment of decisions and use of European Court of human rights practice" courts of Ukraine on examination of a case use the Convention and practice of European Court of human rights (furthermore – ECHR) as the source of law. One of principle aspects of law supremacy in understanding clause 1 Article 6 of the Convention of human rights and principal liberties is the principle of legal certainty (assurance) which claims among other that final judgement by the court of a dispute will not be put in doubt (legal certainty principle as a basic of a fair judicial examination)» [4].

ECHR a number of times in its decisions including concerning Ukraine stated that the right on a fair judicial examination is guaranteed by clause 1 Article 6 of the Convention shall be determined in the light of the Preliminary statement of the Convention, certain part of which declares law supremacy by a joint inheritance of High Contractual Parties. One of principle law supremacy aspects is the legal certainty principle which stipulates pursuing res judicata principle, thus principle of finality of judgement according to which neither of the parties does not have right to claim the review of final and obligatory decision only with the aim of rehearing of a case and determination of a new decision. Avoiding of this principle is possible only when it is due to special and insuperable force circumstances. (clause 46 decision in Case «Ustymenko against Ukraine»), clauses 51, 52 decision on case «Ryabyh against Russia», clause 31 decision in case «Marushyn against Russia», clause 61 decision in case «Brumaresku against Romania»).

Defending legal certainty principle as in the case of review of judicial acts in the survey order: (Court decision in cases «Svitlana Naumenko against Ukraine», «Tregubenko against Ukraine», «Ryabyh against Russia»), and in cases of review of cases in connection with identifying new circumstanecs (decision in cases «Pravedna against Russia», «Zhetyakov against Ukraine», clauses 42-48), ECHR considers efficient to follow the same logics when this fundamental principle is undermined by the help of other procedural tools, such as extension of term of challenge.

Thus, ECHR stipulates violation of Article 6 of Convention of human rights and principle liberties in the case against Ukraine on that reason that term for challenge is extended on termination of substantial period of time not for removal of serious judicial mistakes but only in the aim of rehearing of examination and determination of a new decision in the case (case «Ponomariov against Ukraine», clauses 41- 42). Further more in clause 34 decision since 10.05.2012 in the case «Besrykovu against Russia», ECHR constituted that though extension of term of challenge is carried for consideration by national judges, the latter, in ECHR opinion, shall determine if circumstances for such termination of interference in res judicata principle acquitted, especially when national legislation does not limit limits consideration of the court neither in duration, nor in circumstances for determination new temporary terms (clause 34, case «Bezrukovu against Russia»).

In cases concerning Ukraine ECHR number of times stipulated that avoidance from the legal certainty principle is acquitted only in cases of necessity on circumstances of substantial and insuperable character (cases: «Salov against Ukraine», clause 93, «Protchenko against Ukraine», clause 26, 2Kravchenko against Russia», clause 45). Specifically, avoidance from the legal certainty principle is admitted not only in the interests of legal purism, but in the aim of correction of «the mistake that has fundamental meaning for judicial system» (decision in the case «Sutyazhnyk against Russia», clause 38).

National legislation contains limitations for review of a court judgement. Thus, for example, in accordance with part 2 Article 261 Code of Commercial Procedure of Ukraine (furthermore – CCPU) stipulated that it is not depending on respectfulness of conditions of missing term for an appeal claim the court of appeal body rejects in opening of appeal proceedings, if an appeal claim is filed after expiration of one year from the day when a full text of the court decision is drawn up except occasions: 1) file of an appeal claim by a person who is not informed about examination of a case or who is not engaged in taking part in it, if the court passed judgement on his/her rights, interests and (or) duties; 2) missing of term for an appeal claim as a result of occurrence of circumstances of insuperable force. Therewith similar standards are stipulated in Article 293 CCPU Chapter 2 on cassational proceedings [5].

In general court practice attests that appropriate implication of ECHR practice with following finality of judgement principle, thus by resolution from the 3rd of May 2019 of East appeal commercial it is rejected in opening appeal proceedings and an appeal claim is returned on the case No.922/3016/17, by resolution from 3rd of May 2019 of the Supreme Court in the panel composition of judges of the Cassational commercial court it is rejected in the opening of cassational proceedings for a cassational claim in the case No. 906/451/18, by resolution from the 26th of April 2019 of the Supreme Court in the panel composition of judges of the Cassational commercial court it is rejected in the opening of the cassational proceedings on a cassational claim in the case No.914/1129/18 [6]. Specifically, courts in these decisions determine that ECHR a number of times specifies that one of principal aspects of supremacy of law is the principle of legal certainty of the decision in accordance with it neither of the parties does not have right to claim for review of the final and obligatory decision only with the aim of the rehearing of a case and issuing of a new decision. Avoidance from this principle is possible only when it is due to special and insuperable circumstances (see the decision in the case «Ryabyh against Russia», claim No.52854/99).

At the same time the situation is common when persons presuming on the claim of final and obligatory decision of a court, file claims on the decision at the expiration more than a year and without relevant rationale of the grounds of interference in res judicata principle. Moreover, without having at that grounds of special and insuperable character which justify reversal of the decision which is in legal force after long time after its resolution. However, even then the possibility of updating will not be limited as far as parties at reasonable intervals of time have to take measures to know about the state of litigation proceedings.

In this way, in each case national courts have to check if the grounds for renewal of terms for claim justify interference in res judicata principle, whereas intervention with legal certainty principle which specifies following res judicats principle – finality of the decision can lead to the delinquency Article 6 part 1 of the Convention of human rights and principal liberties and cancelling of the final and obligatory decision.

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STEPANENKO A. S.

National University «Odesa Law Academy»,
Associate Professor at the Department of Criminal Procedure,
PhD in Law

LIFE-IMPRISONMENT PENALTY IN THE EUROPEAN COURT OF HUMAN RIGHTS CASE-LAW: UKRAINE PERSPECTIVE

The article is dedicated to the issue of the sentence of life imprisonment in Ukraine and the scope of Article 3 of the Convention on Human Rights and Fundamental Freedoms. The relevant case law of the European Court of Human Rights is analyzed where several principles could be articulated in this regard.

***Key words**: a whole-life sentence, life imprisonment, right to review sentence, ECHR, inhuman treatment.*

Right to have one’s conviction or sentence reviewed is a fundamental human right that enshrined in Article 2 of Protocol No. 7 to the Convention for the protection of human rights and fundamental freedoms (‘ECHR). It is particularly acute for the persons who were sentenced to life imprisonment as such a sentence can potentially violate Article 3 of the ECHR.

Despite the fact that life imprisonment is a relatively new form of punishment for the Ukrainian criminal system that has become a substitute to death penalty (from February 22, 2000 [1]), according to the data provided by public human rights organization ‘Donetsk Memorial’ [2] as at January 1, 2018, there are 1 572 prisoners sentenced to life-imprisonment in Ukraine. It should be noted that if compared to the overall number of prisoners in Ukraine which is approximately 57 100 persons, then the number of prisoners sentenced to life-imprisonment accounts for 2,75% of sentenced prison population or 3,7 per 100 000 of the national population.

At the same time, the numbers are quite different among other member countries of the Council of Europe. According to the last report (as at 2018) produced by researchers from University of Lausanne (Marcelo F. Aebi and Mélanie M. Tiago) on behalf of the Council of Europe (‘SPACE I – 2018’) the total number of sentenced prisoners, prisoners sentenced to life imprisonment and percentage ratio are the following: *Germany* – 50 328, 1 831, and 3,63%; *Italy* – 37 724, 1 727 та 4,57%; *Poland* – 66 137, 397, and 0,6%; *Romania* – 21 072, 161, and 0,76%; *Moldova* – 6 294, 123, and 1,95%; *England and Wales* – 74 803, 7 427, and 9,93% [3, p. 46-47]. Data for *France* and *Russia* is incomplete (and for Turkey there is no data) in the report, however according to another research produced by Bromley Trust and The Prison Reform Trust (‘Bromley Briefings Prison Factfile’) the numbers (as at 2016) are the following: as to *France* – 489 prisoners sentenced to life imprisonment or 0,9% of the total number of sentenced prisoners; as to *Russia* – 1 766 or 0,4%; and as to *Turkey* – 7 303 or 6,0% respectively [4, p. 6].

Thus, Ukrainian figures concerning absolute number of prisoners sentenced to life imprisonment are almost identical to figures of Germany, Italy, and Russia, however, the relative number of the prisoners is lower if compared to Germany and Italy, and much lower than the figures of Turkey, and England and Wales which are considered leaders in Europe. Although Ukrainian figures are moderate but if compared to neighboring countries they are much higher both in absolute and relative numbers, indicating that there is an urgent need for a shift in the state sentencing policy, especially in the area of life imprisonment penalty. Another problem, even more pressing, in this regard relates to a low number of prisoners who were released from the sentence of life imprisonment. As for now, it is known only of one instance of release from life imprisonment, it is a case of Liubov Kushynska who spend 27 years and 9 months in prison [5].

The possibility of release of a person sentenced to life-imprisonment is set out in Article 87 Para. 2 of the Criminal Code of Ukraine, which provides that clemency may consist in replacing a life sentence imposed by a court by a sentence of fixed-term imprisonment for no less than twenty-five years. Meanwhile the procedure of presidential clemency is prescribed by

Presidental Decree No. 223/2015 of April 21, 2015, which states that the release from life imprisonment is possible under two conditions: 1) a life prisoner may lodge an application for clemency after having served at least 20 years of life imprisonment, and 2) a life prisoner or his/her defender, parent, spouse, child or other family member have lodged an application for clemency. At the same time Para. 5. of Decree has the following rule, 'persons convicted for serious or particularly serious crimes, or on two or more counts of premeditated crimes … may be granted clemency in exceptional cases and subject to extraordinary circumstances'. However, what constitute the 'exceptional case' or 'extraordinary circumstances' is unclear from current legislation and thus a life prisoner does not know what attitude should be taken in order to be granted clemency.

Such ambiguity was one of the reasons the Grand Chamber of the European Court of Human Rights ('Court') found a violation of Article 3 of the Convention in the case *Petukhov v. Ukraine (No. 2)*. The Court in § 173 and 174 pointed at vague criteria used in Ukrainian legislation regarding the procedure of release life prisoners as there is no link to the penological grounds for keeping someone in prison and what actions should be taken by prisoners to be considered for release and what conditions. Moreover, Court argued that the procedure of presidential clemency in itself is open to different interpretations as to both the starting point of calculation of 20 years' imprisonment (§ 176) and absence of an obligation in the President of Ukraine and his subordinate authorities to give reasons in their decisions on clemency requests and absence of any judicial review of those decisions (§ 179). Eventually, Court concluded that 'the presidential power of clemency is a modern-day equivalent of the royal prerogative of mercy, based on the principle of humanity, rather than a mechanism, based on penological grounds and with adequate procedural safeguards, for review of a prisoner's situation' (§ 180). For these reasons, the Court has found the violation of Article 3 of ECHR on account of the applicant's irreducible life sentence [6].

It should be noted that the Court has developed several principles and standards regarding the imposition of a sentence of life imprisonment. The Court recognizes states' margin of appreciation as regards to the right to impose punishment to perpetrators and ECHR does not prohibit the imposition of a life sentence on those convicted of especially serious crimes and this mere fact does not constitute the violation of Article 3 of ECHR. In the meantime, Court stated that such sentence should be must be reducible de jure and de facto, meaning that there must be both a prospect of release for the prisoner and a possibility of review [7, § 100]. Other principles should include: 1) principle of legality («rules having a sufficient degree of clarity and certainty», «conditions laid down in domestic legislation»); 2) principle of the assessment of penological grounds for continued incarceration, on the basis of «objective, pre-established criteria», which include resocialisation (special prevention), deterrence (general prevention) and retribution; 3) the principle of assessment within a pre-established time frame and, in the case of life prisoners, «not later than 25 years after the imposition of the sentence and thereafter a periodic review»; 4) the principle of fair procedural guarantees, which include at least the obligation to give reasons for decisions not to release or to recall a prisoner; 5) the principle of review [6, § 168, 178; 7, § 99-100]. As to the last principle, it should be noted that whether the review must be necessarily of judicial form is subject to debate as was underlined by Judge Pinto De Albuquerque in his partly concurring and dissenting opinion in the case of *Petukhov v. Ukraine (No. 2)* [6].

Thus, Ukrainian penal policy as regards to a sentence of life imprisonment should take these principles seriously and introduce an effective mechanism of review of that category of sentences with clear rules and conditions which provide the possibility of release. Considering the procedure of release of life imprisonment in Ukraine, the review mechanism should be at least of administrative form.

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CHYSTIAKOVA Y. V.

National University «Odesa Law Academy»,
Associate Professor of the Department of International and European Law,
PhD in Law

THE USE OF INTERIM MEASURES OF THE EUROPEAN COURT OF HUMAN RIGHTS BY UKRAINE AND AGAINST UKRAINE

Key words: *European Court of Human Rights, Convention, interim measures.*

The procedure of individual applications to the European Court of Human Rights (ECHR) under the article 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) has granted a possibility for private persons to protect their rights on international level. Among the most critical issues of the ECHR work is length of procedure. It will take long period of time since the launch of application till the final judgement. The interim measures is the mechanism worked out by the ECHR for prevention damage for the applicant in urgent situations. Those measures are prescribed by article 39 of the Rules of Court.

Although interim measures are provided for only in the Rules of Court and not in the Convention, States Parties are under an obligation to comply with them. Grand Chamber judgments have given the Court an opportunity to clarify this obligation, based particularly on Article 34 of the Convention [1]. As example, in *Mamatkulov and Askarov v. Turkey* judgment the Grand Chamber of the Court for the first time concluded that, by failing to comply with interim measures indicated under Rule 39 of the Rules of Court, a State Party had failed to comply with its obligations under Article 34 of the Convention. The Court noted in particular that, under the Convention system, interim measures, as they had consistently been applied in practice, played a vital role in avoiding irreversible situations that would prevent the Court from properly examining the application and, where appropriate, securing to the applicant the practical and effective benefit of the Convention rights asserted. Accordingly, in those conditions, a failure by a State which had ratified the Convention to comply with interim measures would undermine the effectiveness of the right of individual application guaranteed by Article 34 and the State's formal undertaking in Article 1 to protect the rights and freedoms in the Convention.

The ECHR may, under Rule 39, indicate interim measures to any State party to the European Convention. Interim measures are urgent measures which, according to the Court's well-established practice, apply only where there is an imminent risk of irreparable harm. Such measures are decided in connection with proceedings before the Court without prejudging any subsequent decisions on the admissibility or merits of the case in question. In the majority of cases, the applicant requests the suspension of an expulsion or an extradition. The Court grants such requests for an interim measure only on an exceptional basis, when the applicant would otherwise face a real risk of serious and irreversible harm. For instance, according the official statistics during 2018 there were 58 Rule 39 requests against Ukraine and only 4 of them were granted (49 and 5 in 2017, 31 and 6 in 2016 accordingly) [2]. Separate type of application of the interim measures pursuant to Rule 39 of the Rules of Court is an application against two states – Ukraine and Russia. The court does not provide any explanation as to the substance of the applications filed against two countries (there are only official statistics), but we can suggest that the statements concerned the military conflict in the East of Ukraine and the annexation of the Crimea, in particular, the rights of those who were captured captive [3].

In the Court's case-law as it currently stands, Rule 39 of the Rules of Court is not applied, for example, the following cases: to prevent the imminent demolition of property, imminent insolvency, or the enforcement of an obligation to do military service; to obtain the release of an applicant who is in prison pending the Court's decision as to the fairness of the proceedings; to ensure the holding of a referendum; or to prevent the dissolution of a political party [1].

Unlike the application to the ECHR, the special form is not available for the petition of interim measures. It can be made in an arbitrary form, indicating the articles of the Convention which, in the opinion of the applicant, will be violated in the absence of such provisional measures, and the justification that the applicant faces a real risk of serious and inevitable harm if the corresponding interim measure is not applied, and providing relevant evidence. In the case of a request for medical measures, such evidence is the appropriate medical documentation on the health of the person and the conclusions of the doctors on the need for special medical treatment or treatment in specialized medical institutions. Regarding requests for suspension of expulsion or extradition, reports from international human rights organizations indicating the threat of death or ill-treatment of the applicant in the country of extradition are provided. In addition, a petition for the application of interim measures is also accompanied by judicial decisions, correspondence with the relevant authorities as evidence of the applicant's use of all effective domestic remedies. The petition for the application of interim measures may be filed both together with the main statement of the alleged violations, and separately. In the case of a separate application for interim measures, the Court will indicate in its letter the date on which such a statement should be sent. If these requirements are not met, the ECtHR will not consider it [4].

The majority of interim measures undertaken against Ukraine concerned the problem of health and conditions of detention. As example, case of *Pivovarnik v. Ukraine* within which Ukraine failed to follow the request of the Court. On 19 June 2015 the acting President of the Section, upon the applicant's request under Rule 39 decided to indicate to the Government that they should present the applicant urgently for medical examination by a specialised doctor of the City Hospital; secure for the applicant immediately, by appropriate means, treatment to his state of health; and inform the Court about the applicant's state of health and the measures undertaken. From

6 until 9 July 2015 the applicant underwent an in-patient examination at the City Hospital in the course of which a number of blood tests and an ultrasound examination were conducted and the applicant was examined by a number of specialists. The hospital issued an opinion according to which the applicant was suffering from chronic HCV «in an inactive phase» and liver impairment. He was prescribed hepatoprotectors. On 14 July 2015 the Government informed the Court about the applicant's examination at the City Hospital. But on 19 August 2015 the applicant complained to the Court that the recommendations of the City Hospital doctors were not being followed. The Court invited the Government to comment on those allegations. Only on 1 September 2015 the applicant started to be treated with hepatoprotector medicine.

In final judgement the Court noted that the prison authorities failed to comply with the interim measure from 9 July to 1 September 2015. The purpose of the interim measure indicated by the Court, as is apparent from its very wording, was to ensure that the applicant received appropriate medical assistance in detention while his case was pending before the Court. However, this purpose could not be achieved since the prison authorities merely ensured the initial examination of the applicant and then, having provided a report to the Government Agent's office (and, through it, to the Court), apparently neglected to follow up on any of the medical recommendations made following that examination without providing any justification for this omission. Such conduct on the part of the prison authorities undermined the effective operation of the interim measure indicated by the Court since it required the Court to continue to intervene to make sure that the respondent State continued to comply with the measure even after they had reported to the Court that the measure has been complied with.

One of the most resonance interim measure taken against Ukraine concerned the order of the ECHR to Ukrainian government not to access any data from the cell phone of Radio Free Europe/Radio Liberty investigative reporter *Natalia Sedletska*. The ECHR pledged to consider her appeal as a "matter of priority". On August 27, Kyiv's Pechersk district court approved a request from the Prosecutor-General's Office to allow investigators to review all data from Sedletska's phone from 1 July 2016 through 30 November 2017. The ruling stems from a criminal investigation into the alleged disclosure of state secrets to journalists in 2017 by Artem Sytnyk, director of the National Anticorruption Bureau of Ukraine. The first interim restrictive measures in a journalist's complaint were made by the Court on 18 September 2018 and lasted for one month. On 16 October 2018, the European Court in accordance with Rule 39 of its Rulei extended the urgent interim protective measures in the case of a Sedletska. The Court has not set any time limit for a new measures. applications

The ECHR procedures cover not only individual applications but also inter-state applications. Under the article 33 of the Convention any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party. States may also actively use the mechanism provided for by Rule 39 of the ECHR Rules. For example, ECHR grants interim measure in new inter-State case brought by Ukraine against Russia concerning events in the *Kerch Strait*. 4 December 2018 the Court decided to indicate to the Russian Government by way of interim measure that, in the interests of the parties and the proper conduct of the proceedings before it, they should ensure that appropriate medical treatment be administered to those captive Ukrainian naval personnel who required it, including in particular any who might have been wounded in the naval incident that took place in the Kerch Strait on 25 November 2018.

Summarizing all above, it should be stated, that Rule 39 of the Rules of Court provides the applicants with an instrument of urgent reaction of the Court on the violation of rights covered under the Convention. This tool might be used by individual applicants for immediate cease of violation by any Member State. As well it is very valuable mechanism in the procedure of inter-state applications. The interim measures were used both by Ukraine and against Ukraine, with the main purpose to avoid the breach of Convention.

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BILOKUR YE. I.

National University «Odesa Law Academy»,
Associate Professor at the Department of Administrative and Financial Law,
PhD in Law

THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS ON THE PROVISION OF A SUIT IN ADMINISTRATIVE PROCEEDINGS

The article is devoted to the study of the practice of applying the recommendations of the European Court of Human Rights in the process of resolving administrative courts the issue of securing a suit in administrative legal proceedings. The provisions of the Code of Administrative Proceedings regarding the provision of a suit, as well as the decision of the ECtHR court in this regard, were analyzed, and recommendations were given for improving the mechanism for providing an administrative suit in order to effectively protect a person.

Key words: *administrative proceedings, provision of an administrative suit, effective means of legal protection, administrative suit, Code of Administrative Proceedings, European Court of Human Rights.*

The activities of public administration are carried out in numerous areas of social life and can have a significant impact on individual rights, freedoms and interests. Immediate and complete execution of administrative acts that have become or could be the subject of appeal, are capable in some circumstances to cause irreparable harm to the interests of individuals, and, therefore, the task of national legal proceedings is to try to prevent such consequences as far as possible. The expediency of guaranteeing a temporary protection for the individuals by the courts should be determined without disregarding the need for effective administrative action.

In accordance with Recommendation NR (89) 8 On Provisional Court Protection in Administrative Matters adopted by the Committee of Ministers of the Council of Europe on September 13, 1989 [1] when a court is seized of a challenge to an administrative act, and the court has not yet pronounced its decision, the applicant may request the same court or another competent court to take measures of provisional protection against the administrative act. The person concerned shall have the same right to request a competent court to take measures of provisional protection prior to his challenging the act, in case of urgency or when an administrative complaint, the making of which does not have in itself any suspensive effect, has been lodged against the administrative act and has not yet been decided.

In Ukraine, only a judicial procedure for the application of provisional protection measures in administrative cases is provided. However, there is a possibility of such a situation: when a person before filing a lawsuit lodge a corresponding administrative complaint, which itself does not foresee the suspension of an administrative act; the lack of authority or the ability of the administrative authorities to formally suspend the execution of an act creates the possibility that the person concerned, sometimes for a long time, may continuously be at risk of execution of the act.

Art. 150-158 of the Code of Administrative Proceedings of Ukraine [2] (hereinafter referred to as the CAP of Ukraine), the grounds and procedure for the provision of an administrative suit are settled. At first glance, there are a list of the concrete, clear grounds and a detailed procedure for the consideration of petitions for the provision of an administrative suit. However, in the Unified State Register of Judgments, the number of applications for the examination of petitions for administrative suit provision is insignificant, while the number of cases, where the suit is secured, is at an even lower rate. Therefore, there is a need to pay attention to the problematic moments of regulation of this legal mechanism and the reasons for which it is rarely used in practice.

Firstly, with the adoption of the new edition of the CAP of Ukraine in 2017, the institute of suit provision in administrative proceedings has undergone a transformation. Positive point can be noted in increased list of the means of provision and a more detailed procedure for ensuring the suit compared with the previous edition of the Code. However, there is still no automatic suspension of the challenged act, even in certain categories of the cases.

It should be noted that the practice of the ECHR recognizes as an ineffective means of legal protection of rights by filing a lawsuit and separate petition for suit provision by suspending the action of the contested decision. Thus, in the case of «Baysakov and others v. Ukraine» (2010), the ECHR in p.75-78 gave the conclusions concerning the effectiveness of a legal remedy for the rights in court by filing a lawsuit and petitioning for a suit provision in the order of the CAP of Ukraine: «In this connection, the Court notes that appeals to administrative courts on the basis of Art. 2 CAP of Ukraine with the requirement to cancel the extradition decision does not automatically stop the action of the contested decision. In order to suspend the action of the challenged decision, the court shall issue a special ruling [on taking measures to secure an administrative suit]. The administrative court has discretionary powers to resolve such issues and may decide on the petition of the party or on its own initiative. Having regard to the foregoing, the Court concludes that the applicants have not had an effective and accessible remedy for their complaints ...» [3].

Namely, the ECHR considers that filing a suit should automatically stop the action of the contested decision, only in that case the right to an effective remedy of rights will be respected. The Court considers that such a situation is equivalent to a refusal to administer justice, which violates the very essence of the applicant's right to access to a court guaranteed by Article 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms [4].

Therefore, it would be advisable to foresee in the CAP of Ukraine cases where the challenged decision stops automatically when filing an administrative suit. Another option to improve this mechanism is to establish the possibility of an immediate solution to the problem of ensuring the suit without notifying the defendant and third parties in the case of justification and urgency. It is explained by the specifics of the Code of Administrative Proceedings of Ukraine, which is connected with the need to ensure the realization of the rights of the individual who challenges to the court to appeal decisions of the authorities, as the weaker party in such a dispute. It is needed to recall that the existing CAP of Ukraine provides a general procedure for reviewing the application for securing a suit within two days.

With regard to the practice of implementing the mechanism of administrative provision, based on the analysis of court decisions on this issue, the following should be noted. Firstly, administrative courts often refuse to secure a suit in favour of the fact that measures to implement the project are impossible, since in practice the decision is actually eliminated without considering the case that it does not meet the requirements of the legal institution of provision.

Secondly, courts often refuse to ensure a suit due to the gradual lack of substantiation of the need for security, neglecting their discretionary powers and the principle of the official collection of all case trials. On the one hand, in accordance with the requirements of paragraph 17 of the Resolution of the Plenum of the Kyiv Administrative Court of Ukraine No. 2 of March 6, 2008, «On the Practice of the Application of Administrative Courts of Certain Provisions of the CAP of Ukraine during the Review of Administrative Cases» in the ruling about the administrative suit provision the court should give the causes that gave reasons to say there is a real danger for the rights and interests of the plaintiff prior to the adoption of a decision in an administrative case, or the protection of those rights, freedoms and interests will be impossible without such measures, or to restore them, the need will be ad hoc significant cost and expenses, as well as indicate the attribute, which testifies the fact of illegality of the decision, act or inactivity of the subject of authoritative powers [5]. In each case, the court must, on the basis of specific evidence, determine whether one of the circumstances is present, or assess whether it can ensure the fulfilment of the obligations that can be prevented. Also, in Recommendation NR (89) 8 On Provisional Court Protection in Administrative Matters it is said that measures of provisional protection may in particular be granted if the execution of the administrative act is liable to cause severe damage which could only be made good with difficulty and if there is a prima-facie case against the validity of the act.

However, neither these recommendations nor the provisions of Art. 152 CAP of Ukraine (regarding the content and form of statement of suit provision) do not contain provisions on the need to provide evidence by the applicant. However, the judicial practice shows the opposite – the courts, having considered the claim for suit provision, refuse to secure a suit on the grounds that the plaintiff did not provide evidence of the existence of an obvious danger of causing damage to his rights, freedoms and interests before taking a decision in an administrative case, without substantiating the reasons the impossibility of protecting (renewal) of the rights, freedoms and interests of the plaintiff after the entry into force of a decision in an administrative case without the use of such measures, did not reveal what is the need to apply the efforts and costs of restoring the rights of the plaintiff in the future, as well as the obvious evidence of the defendant's wrongful acts (for example, the Kyiv District Administrative Court’s decision about refuse to enforce the measures of provisional protection adopted on September 25, 2018, 810/4451/18).

Taking into account the above, the problematic moments of the application of the mechanism for providing an administrative suit are advisable to resolve in two ways: 1) improvement of legal regulation – foreseeing the automatic suspension of appealed administrative decisions, at least in certain categories of cases, or the possibility of an immediate solution to the issue of securing a suit; 2) the change of the approach of administrative courts to resolving petitions to secure a claim from excessive formalities to the full use of the principle of official identification of all circumstances in a case and the practice of ECHR in order to effectively protect individuals from violations done by the public administration.

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BOGACHENCO A. A.

National University «Odesa Law Academy»,
Post-Graduate Student of the Department of Administrative and Financial Law

THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE ESTABLISHMENT OF THE INSTITUTE OF PROCESSUAL RIGHTS ABUSE IN THE ADMINISTRATIVE PROCEEDINGS IN UKRAINE

The article is aimed at investigating the institution of abuse of rights in the practice of the European Court, as well as to carry out a comparative analysis of the theoretical aspects of the processual rights abuse and processual measures aimed at counteracting the abuse of processual rights in the fulfilment of justice in the European Court of Human Rights and the courts of administrative jurisdiction in Ukraine.

Key words: *abuse of processual rights, opposition to abuse of processual rights, administrative proceedings, measures of processual influence, Code of Administrative Proceedings of Ukraine, European Court of Human Rights.*

One of the shortcomings of the Code of Administrative Proceedings of Ukraine was the recent consolidation of the principle of inadmissibility of abuse of processual rights at the legislative level. The indicated negative phenomenon is characterized, above all, by the use by a person of rights granted to it by the processual law for a purpose other than that provided by the law, which leads to impediment to the proper adjudgement.

In the study, N. Chechina noted that the good faith behaviour of each party in the process ensures the normal functioning of the court and all persons involved in the process, ascertaining the material (objective) truth in each case, and at the same time guarantees the possibility of carrying out the processual rights of the other party, ensures his interest in the prompt and proper consideration of cases [1, c. 10]. However, in the practice of administrative proceedings, the incidents concerning unfair behaviour of the participants in cases while implementing their processual rights and obligations are increasingly encountered.

Legislative consolidation of this principle of administrative proceedings gave rise to the possibility of developing legal mechanisms to combat this phenomenon. It should be noted that processual law does not contain a definition of «abuse of processual rights», however, the legislator in Art. 45 CAP of Ukraine has attempted to determine what actions, contrary to the task of administrative justice, the court, in the light of specific circumstances, may consider as processual rights abuse [2].

Unlike national processual law, the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, since its adoption, contained several provisions on the prohibition of abuses of rights that are essentially different. Thus, in Art. 17 of the Convention, the prohibition of abuse of rights is that none of the provisions of this Convention can be construed as conferring any State, group or person the right to engage in any activity or to take any action aimed at the abolition of any rights and freedoms recognized by this Convention or their limitations to a greater extent than is provided for in the Convention [3]. The above norm is directed at the prohibition of abuse of rights affecting the fundamental rights and freedoms of others guaranteed by the Convention and more detailed in other articles of the Convention. Abuse of such rights is, in the vast majority, the subject of substantive complaints by the European Court of Human Rights.

With regard to unfair use of processual rights by the participants in the process and the consequences of such behaviour of individuals, the relevant provisions are enshrined in Art. 35 of the Convention, which regulates the conditions for the admissibility of complaints filed. In accordance with § 3 (a) of Art. 35 of the Convention, the court declares inadmissible any individual application filed under art. 34 if he considers that this application is, in particular, an abuse of the right to submit an application. At the same time, § 4 of this article provides that the Court may refuse any statement which it considers inappropriate under this Article at any stage of the proceedings [3].

According to the position of the European Court of Human Rights, as set out, for example, in Miroļubovs and Others v. Latvia (§§ 62 and 65), "abusing" means any conduct by the applicant that is clearly not in accordance with the purpose of the Convention’s guaranteed right of recourse, violates the established procedure of the Court, or complicates the proper conduct of the trial in court. The Court emphasized that the rejection of the complaint as a result of abuse of the right to filing it was an exclusive measure [4].

The content of the Convention itself does not contain a complete list of actions that the Court may consider to be an abuse of processual rights, but an analysis of processual grounds for the inadmissibility of complaints under this criterion and the allocation of similar categories of cases in which the Court found abuse of the right to file a complaint made in the Practice Guide on Admissibility Criteria, developed on the basis of case law of the European Court of Human Rights. Up to five main categories of such cases have been classified, in particular:

– misinformation of the Court, which may consist, for example, in deliberate distortion of facts in order to mislead the Court (Varbanov v. Bulgaria), filing a complaint on behalf of another person (Case Drijfhout v. the Netherlands), forgery of documents sent to the Court (Jian case v. Romania, Bagheri and Maliki v. the Netherlands, Poznanski and others v. Germany);

– use of abusive vocabulary, provocative expressions or threats (Reh?k v. the Czech Republic, Duringer and Grunge v. France, Guntis Apinis v. Latvia);

– violation of the duty to maintain the confidentiality of the content of the negotiations concerning the settlement of the dispute (Hadrabov and others v. the Czech Republic, Popov v. the Moldavian Republic);

– filing a complaint without any serious reason or with intentional intentions (Migliore et al., Italy, Simitzi-Papachristou, etc. v. Greece);

– other cases, the exhaustive list of which is absent [5].

The research of the practice of the European Court of Human Rights shows that other cases that were considered by the Court as an abuse of the right to file a complaint and, as a result, the complaint was declared inadmissible, was, for example, a violation of the applicant's obligation to maintain his appeal during the whole trial. Thus, if the applicant (or his representative) fails to respond within reasonable time to the requests of the Secretariat, does not provide new information about the movement of his case in internal procedures or provides false information, such behavior, according to the Court, may indicate abuse of the right to appeal to the Court [6]. Abuse of the right to file a complaint may also be deemed to be cases where the applicant manages the desire to gain popularity, advertising or promotional effect (in which case the complaint is not automatically rejected due to abuse, but abuse can be established by the Court (McFeeley and Others v. The United Kingdom (Commission decision) , Khadjialiyev and others v. Russia, Parti travailliste Orgien v. Georgia) [5].

It should be noted that views on the definition of the essence of the phenomenon, such as the abuse of processual rights and its negative impact on the quality of the administration of justice, set forth by domestic scholars, in most cases coincide with the interpretation of this concept in the practice of the European Court of Human Rights, however this is different in determining the actions of participants in the process, which are regarded as abusing processual rights.

An analysis of the practice of the European Court of Human Rights shows that the list of actions that the Court regards as abuse of the right to file a complaint is much broader than that provided in Art. 45 CAP Ukraine list, and even covers that behaviour that is not directly aimed at violating the order of the Court or obstructing the consideration of the case in court. At the same time, when the facts of abuse of rights are stated in the European Court of Human Rights, it is also necessary to take into account the objectives pursued by the applicant when filing her.

The most common consequence of the detection of abuse of procedural rights under the provisions of the Convention is the announcement by the European Court of Human Rights of the complaint of inadmissibility.

Similar to the content of the measure to counter such a phenomenon can also be used by national courts in the administration of administrative proceedings. So, according to Art. 45 CAP of Ukraine, in case of revealing facts of abuse of processual rights, courts of administrative jurisdiction are entitled to leave without consideration or to return a complaint, a statement, a petition. In addition, the legislator granted the courts of administrative jurisdiction in Ukraine to impose a fine for abusing processual rights, committing acts or assuming inactivity in order to interfere with legal proceedings.

However, the announcement of a complaint as inadmissible is not the only measure of influence on the participants in the case of the European Court of Human Rights. An example of the Court's use of other measures is the adoption of decisions prohibiting representatives (lawyers) from representing the interests of the applicants, in particular, such a case is the prohibition of Ukrainian lawyer Tselovalnichenko N. E. to represent the interests of the applicants in a case before the European Court of Human Rights in connection with the provision of false information and abuse of the right to petition the Court [7]. Such cases are not uncommon. A similar precedent was the deprivation of this right by Serbian lawyer Mikhail Petrovich in 2010, after he filed with the ECtHR more than 500 lawsuits, «most of which were extremely dubious» [8].

In our opinion, giving the court the opportunity to prevent representatives who grossly abuse processual rights from participating in a particular case, as well as the right to send reports to the High Qualifications-Disciplinary Commission of reports of misuse by lawyers during the trial and the consequences to which these actions resulted advocates for solving the issue of bringing to disciplinary responsibility, will promote the discipline of representatives of the parties to the case, reduce the manifestations of the negative phenomenon. We believe that the introduction of such a measure to counteract the abuse of processual rights will have a positive effect on the process of administering justice in Ukraine, will contribute to a better and more efficient administration of justice.

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DEMENCHUK M. O.

National University «Odesa Law Academy»,
Assistant Professor at the Department of Judiciary, Law
Enforcement Agencies and Advocacy, PhD in Law

ON THE INFLUENCE OF THE ECHR'S DECISIONS ON UKRAINE'S JUDICIAL PRACTICE

The article researches general provision on the ECHR activity, its influence on the judicial system and judicial practice of Ukraine.
Key words: *judicial practice, Supreme Court, unity of judicial practice, Convention, European Court of Human Rights.*

The European Court of Human Rights is the international court, created in 1959, which considers applications from persons, nongovernmental organization, group of individuals or from the state about violation of the European Convention on Human Rights.

Unfortunately, Ukraine play a leading role in the number of complaints made to this Court. In 2018 number of complaints was 12,9% from the general amount of complaints, in 2017 – 12,9%, in 2016 – 22,8 % [1]. Mostly citizens apply because of the violation of the Art. 6 "Right to a fair trial" of the Convention.

Ukraine ratified this Convention in 1997, and therefore the Court's decisions have binding nature. This provision is enshrined in the Law of Ukraine «On the Fulfillment of Decisions and Application of Practice of the European Court of Human Rights» dated February 23, 2006. Problems related to the implementation of these decisions require a separate study.

Consequently, the reduction of the number of appeals to the ECHR can be considered as an indirect confirmation of increasing public confidence in the judiciary, improving the quality of justice and, as a result, the existence of a single judicial practice.

It seems that it is also necessary to draw attention to the legal nature of the decisions of this court in Ukraine. Thus, Art. 17 of the Law of Ukraine «On the Fulfillment of Decisions and Application of Practice of the European Court of Human Rights» stipulates that Ukrainian courts have apply in practice the case law of the ECHR as a source of law. M. Marguelo noted that the «practice of the Court» includes not only the practice of the ECHR in cases against Ukraine, but the whole array of the Court decisions [2]. The said normative provision is also enshrined in Part 2 of Art. 6 of The Code of Administrative Proceedings of Ukraine, according to which the court applies the rule of law, taking into account the judicial practice of the ECHR, thus the question of the case-law of the court's decisions raises.

According to the point of view of A. Marchenko, for most European countries, the practice of the ECHR is merely an interpretation of the rules, highlighting the essence of the provisions of the Convention, which facilitates its direct application. Thus, the decisions of this Court are not precedent, but are the only source of a dynamic interpretation of the Convention. The scientist also noted that the ECHR decision is a new type of source of law that is not part of the usual classification of sources of law for on precedent and codified norm [3, c. 24].

Another scientist – K. Ismaylov, concluded that the most widespread views on the legal nature of the decisions of the ECHR are their understanding as interpretative acts and judicial precedents. Conversely, Y. Popova points out that the case law of the ECHR, at least repeatedly confirmed, can be difficultly categorize as well-established judicial practice, because the practice of the ECtHR is not a practice of the courts of the national judicial system, its decisions are valid because they have nature of the convincing precedents [2, p. 62].

It is necessary to mention, that this Court can significantly influence the quality of the work of the Supreme Court and the condition of the judicial practice in the state, for example, by paying attention to the inconsistency of the legal positions of the highest judicial body of the state. Thus, considering the case «Serkov v. Ukraine» (application no. 39766/05), the ECHR noted the inconsistency of the legal positions of the Supreme Court of Ukraine. It was found, that on January 15, 2003, the Supreme Court of Ukraine made a decision that allow application of the exemption from value added tax to import transactions carried out by a single (unified) taxpayer. In future, on December, 23, 2003, the Supreme Court of Ukraine applied the opposite approach, establishing that exemption from VAT can not apply to import transactions carried out by such taxpayers. According to the ECHR, the lack of transparency negatively affects public confidence and faith in the law, as well as the predictability of court decisions. The Court also noted that the possibility of different interpretations of the same provisions of the law was mainly due to gaps in national legislation on this issue.

In the case «Sokurenko and Strigun v. Ukraine» (application No. 29458/04 and No. 29465/04), the ECHR considers that, having exceeded its powers, which were clearly set out in the Commercial Procedural Code, the Supreme Court can not be considered as the court which was established by law in the sense of clause 1 of Art. 6 of the Convention relating to the proceedings complained. This led to the practice of EU decisions in some cases [4, p. 16-17, 40].

In our opinion, ensuring the unity of the judicial practice of the ECHR also uses non-procedural mechanisms. Thus, the ECHR systematically issues manuals on the correct application of the articles of the Convention, for example, Art. 4 «Prohibition of slavery», art. 5 «Right to freedom», and separate reviews of judicial practice of the Court on one or another issue.

Concerning the possible cooperation between the ECHR and the Supreme Court, we share the opinion of S. Shevchuk, who drew attention to the need to reconcile court practice between this court and the courts of the national system, including the Supreme Court. It's necessary to mention, that the ECHR does not assess the correct application of domestic law and does not play the role of the highest judicial authority, but only intervenes when states «do not work» at the national level and do not stop violating rights and freedoms [5, p. 91].

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KOZAKEVYCH O. M.

National University «Odesa Law Academy»,
Post-Graduate Student of the Department of General Theoretical Jurisprudence

RIGHT TO ACCESS TO JUSTICE IN THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS

The essence and elements of the right to access to justice are investigated in the article on the basis of the analysis of the case law of the European Court of Human Rights.

***Key words**: right to access to justice, the European Court of Human Rights (ECHR), the European Convention for the Protection of Human Rights.*

The right to access to justice has a special place in the human rights system. Without its realization, it is impossible to realize the principle of the rule of law, the existence of a law-governed state, the formation of civil society. The decisive trend is that the applicants, who turn to the European Court of Human Rights (hereinafter –the ECHR), are increasingly referring to the right to access to justice. To date, there has been a fairly significant case-law on the implementation of this right. An analysis of this practice makes it possible to identify the essential features of the right to access to justice, to theoretically substantiate the fundamental significance of this right in the process of securing any other human rights and freedoms.

In view of the content of Article 6 of the European Convention on Human Rights (hereinafter – the Convention), everyone is guaranteed the right to access to justice, which provides that everyone has equal rights to apply to the courts and, in the administration of justice, provides a fair trial, regardless of the parties of the process and nature of the dispute [1]. The European Court of Human Rights, having examined the case of Golder v. the United Kingdom in 1975, has essentially come to the conclusion that «...the structure of Article 6 of the Convention would be ineffective if it did not protect the right for the consideration of this case... Therefore, the right to access to justice is an integral part of the right guaranteed by Article 6 (1)...» [2].

The right to access to justice follows the principle of international law, which prohibits denial of justice (Golder v. the United Kingdom). This principle applies both to civil and to criminal proceedings (Devere v. Belgium) and ensures the right to a judicial decision (Ganci v. Italy) [3, p. 101]. Thus, the ECtHR refers the legal capacity to sue to the accessibility of justice, that is, the right to bring an action before the court that has the power to deal with matters of fact and law pertinent to a particular dispute in order to make a binding decision. There is a certain area of intersection of this right and the right to a «court established on the basis of the law», because both of these rights include the requirement for access to a judicial institution capable of making binding decisions, rather than conclusions of a recommendation nature (Benten v. the Netherlands) [3, p. 105].

In Ashingdean v. the United Kingdom, the Court concluded that the right of access to justice might be limited: States have the right to impose restrictions on trial participants, but these restrictions should have a legitimate aim, be proportionate and not so significant as to distort the essence of the law. The right to claim compensation for pecuniary and non-pecuniary damage is considered as an integral part of the right to access to justice in civil cases both for individual applicants and for legal entities (Zivulinskas v. Lithuania) [3, p. 274].

The procedural barriers to accessibility (terms, costs, jurisdiction) of the European Court of Human Rights include the establishment in national law of procedural restrictions and requirements for the proper administration of justice, but restrictions should not violate the very essence of the right to access to justice (Hadjianastassiu v. Greece). In the case (Airi v. Ireland), the ECtHR noted that full access to justice can be ensured through free legal aid, as well as the simplification of the procedure for representing its interests in civil cases in person. Moreover, if the state itself has established a system of free legal aid in civil matters, any refusal to grant it will be treated as interference with the exercise of the right to access to justice (non-autonomous requirement). However, if the state has established an effective mechanism for distinguishing between cases that require or do not require legal aid, and the Convention gives States a great deal of freedom in this regard, then there will be no violation (Granger v. the United Kingdom). In addition, the accessibility of justice includes such an element as the final decision of the court means that the court decisions become final, become binding without any risk of their cancellation (Brumarescu v. Romania) [4, p. 190].

When analyzing the case law practice of the ECHR, it should be noted that the right to access to justice applies not only to the right to apply to a court but also provides for a wider range of powers related to the fairness of the consideration procedure.

In view of modern theoretical and legal studies, the idea of the real nature of justice prevails: the accessibility of justice implies not only the solution of various organizational and technical issues when appealing to a person for judicial protection, but also the content of the justice itself. That is, access to justice will be considered implemented when the trial has all the signs of justice.

An independent and impartial court created on the basis of the law is an element of the accessibility of justice. Accordingly, the right to access to justice includes three interlinked requirements relating directly to the judicial authority. In its decisions, the ECtHR has determined: «The court established on the basis of the law» refers to the question whether the determining authority has the characteristics of the «court» within the meaning of Article 6, as well as the legality of the court at the national level (Lavents v. Latvia, 2002); «Independence» as the existence of procedural safeguards for the separation of the judiciary from other branches of government, primarily from the executive one (Clark v. the United Kingdom); «Impartiality» as a lack of bias and interest in relation to the parties to a particular dispute, as well as independence from the influence of the parties to the dispute (Piersack v. Belgium, 1982) [5, p. 210-215].

The fairness of the trial as an integral part of the accessibility of justice in ECHR judgments is determined by the «just» nature of the consideration of a particular dispute at all stages. «Justice», from the point of view of Article 6, depends on whether the applicants were given the opportunity to state their position in the case and to challenge the evidence that they consider to be erroneous, and not because of the level of correctness (faithfulness) of the national court decision (Gefgen v. Germany, 2008). In addition, in some decisions of the ECtHR, one can find the position that «fair consideration» includes such aspects of justice as the adversarial nature of the process (Rowe Davis v. the United Kingdom, 2000), equality of parties (Brandstetter v. Austria, 1991), personal presence (Ekbatani v. Sweden, 1988) and the right to a public hearing (Campbell and Fell v. the United Kingdom, 1984).

The reasonableness of the trial period is determined by Article 6, which is independent of the national procedure for determining the duration of procedural actions, since the violation of the statute of limitations, established by national laws, does not necessarily indicate a violation of Art. 6. Unlike many national systems, in practice, the ECtHR does not have a time limit to deal with a particular dispute and all disputes are dealt with according to specific circumstances. As can be seen in the analysis of the practice of the ECHR, the reasonable period is determined by the aggregate verification based on criteria such as the nature of the dispute (Martins Moreira v. Portugal, 1990), dispute complexity (De Clerk v. Belgium, 2007), parties' behavior (Zimmermann and Steiner v. Switzerland, 1983), the behavior of the authorities (Pretto v. Italy, 1983) [5, p. 321].

Consequently, we can conclude that the Convention for the Protection of Human Rights and Fundamental Freedoms gives everyone the right to access to justice. In pursuit of this theoretical construct, the European Court of Human Rights is attempting to give a more practical effect to this provision of the Convention in order to more effectively implement the mechanism of protection of human rights. In its decisions, the ECHR enshrined the right to access to justice, and also disclosed in detail the characteristics of each of its constituent elements. The right to access to justice is a prominent place among universally recognized human rights, since it opens up opportunities for the protection of all other rights and embodies the idea of a real nature of justice.

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KOSIANENKO S. O.

National University «Odesa Law Academy»,
Student of Judicial and Administrative Faculty

THE EXPERIENCE OF THE UK CASE LAW IN THE ESTABLISHMENT OF HUMAN RIGHTS ACCORDING TO THE ECHR JUDICIAL PRACTICE

Key words: *judicial precedent, judicial practice, ECHR case law*.

The European Court of Human Rights refers to its practice as case law (precedent). Judicial precedent in the judicial practice of the ECHR is based on the principle of *ratio decidendi* (from Latin – the basis for resolution), and the precedent manifests itself in the fact that the Strasbourg court while deciding cases normally tends to follow the previously used approaches, unless the Court deems them necessary to be changed. In particular, in the imperative conclusion of its judgment, the Court, instead of reproducing the arguments it previously expressed, may refer to the considerations stated in its previous decisions [5; p. 71]. At the same time, the ECHR has reiterated that it is not bound by its own previous decisions and, indeed, from time to time changes its legal positions. This approach appears justified; in actuality, although the possibility of changing judicial practice does not contribute to legal certainty, it should be borne in mind that there is a dialectical contradiction between legal certainty and the development of law. Nonetheless, it can be argued that the ECHR does not always regard its own decisions as necessarily binding.

At the same time, it is important to consider how the national judicial systems should treat the ECHR case law, in particular, whether the ECHR judgments should be binding on them in one way or another, at least in certain cases, given that the parties to the Convention on Human Rights and Fundamental Freedoms (hereinafter – the Convention) follow different legal traditions belonging to either the Anglo-Saxon legal family (common law countries) or to the Romano-Germanic legal family (continental law countries).

Having examined the Anglo-Saxon precedent of England, which is a part of the United Kingdom, the latter acts precisely according to the doctrine *stare decisis* (the law should be applied equally under equal circumstances) in its more rigorous modification. Therefore, it may seem that the precedent of the ECHR should be perceived in England as an Anglo-Saxon precedent, and should occupy the highest level in the hierarchy of precedents. However, the situation is actually different – in the event of a conflict between the precedent of the ECHR and that of the highest court in England, only the latter is applied (Leeds City Council v. Price and others). This assertion can be seen in the judgment of the Court of Appeal regarding the incompatibility of the 2004 ECHR precedent in the case Connors v. United Kingdom with that established by the House of Lords in 2003 in the case Harrow London Borough Council v. Qazi. As a result, it was stated that in such circumstances, the courts of England should be guided by the case law of the House of Lords rather than that of the ECHR.

The above said position received unanimous support among all members of the House of Lords in the decision following the appeal against the judgment of the Court of Appeals in the case Leeds City Council v. Price and others. Thus, there arises a relatively unique precedent, which has been confirmed by the highest judicial authority, regarding the priority in applying domestic law in national courts over the application of ECHR case law.

Moreover, such a conclusion of the House of Lords extends not only to the priority of the domestic precedent, but also to the priority of the domestic law. Thus, Lord Braun explained that, given the compliance of the domestic legislation with the Convention, the court cannot give more weight to human rights. Lord Hope also pointed out that if the domestic law cannot be interpreted in a manner compatible with the Convention (in the light of the ECHR practice), the domestic law should apply (para 88 of the judgment), and Lord Brown emphasized the fact that the court cannot give more weight to individual rights than it is provided for by the domestic law (para 202 of the decision) and should proceed from the fact that the domestic law is in conformity with the Convention (para 203 of the decision) [4].

At the same time, the Anglo-Saxon precedent is not perfect in terms of human rights realization. The cases of discrimination based on different criteria are not infrequent in the case law of the United Kingdom.

Thus, in the case of Chaidan v. Godin-Mendoza (2002), the judge of the UK District Court, based on his decision in the case of Fitzpatrick v. Sterling Housing Association Ltd (1999), ruled that same-sex marriages are not equivalent to marital relations. While the ECHR in the case of Salguelro v. Portugal (2001) emphasized that the Convention does not allow differences based on sexual orientation [8]. Accordingly, it was stated in the case file that the word "man" (in the context of marriage) applies exclusively to heterosexual couples, in accordance with the legislation and case law of the United Kingdom. Having decided on the case Ghaidan v. Godin-Mendoza (2002), the ECHR noted that such a wording at the legislative level is discriminatory and contrary to the Convention for the Protection of Human Rights and Fundamental Freedoms. Moreover, the Strasbourg Court explained that same-sex marriages are also considered marital [4].

An additional example is the case of P.M. v. United Kingdom (2005), which is illustrative to discrimination according to the legal status. The applicant was registered as the father of the child who was born of him and his partner outside the marriage. After their separation (official marriage had not been registered), the applicant was exempted from the tax on the amount that he had paid for the child's maintenance, in accordance with the separate accommodation agreement that the latter concluded with his former partner. However, later, the tax office deprived him of this right, given that he had never been officially married to the mother of his daughter. The position of the ECHR in this case is as follows: in both cases (whether married or not), persons are parents of their children and are obliged to pay for their maintenance. Thus, unmarried parents who have established family life with their children may claim equal rights with married parents regarding contact and care. The Strasbourg Court ruled that it did not see the reasons not to treat the applicant as a parent in a marriage that divorced and lives separately from the mother in the context of a reduction in the tax on child support. The objective of this tax reduction was the desire to facilitate married parents to support a new family, so it is not clear why single parents who established such relationships could not bear the corresponding financial obligations, while equally demanding a discount [7].

Considering the precedent issues of discrimination through the prism of Ukrainian legislation, it should be emphasized that the latter is one of the most democratic, humane and legal in terms of realization of human rights under the Convention. Moreover, the conclusions of the ECHR are binding, as well as the judgments on the territory of Ukraine, which is confirmed by the Law of Ukraine «On implementation of judgments and application of the European Court of Human Rights practice» No. 3477-IV of February 23, 2006 [3]. At the same time, the provisions of the Convention have been reflected in both the Fundamental Law of the State – the Constitution and other normative legal acts [1]. Thus, the Constitution of Ukraine provides that human rights and freedoms are the highest social value of the state, while international treaties ratified by the Verkhovna Rada of Ukraine are part of the national legislation of Ukraine [2].

Consequently, following the signing of the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1950 and the establishment of the European Court of Human Rights in Strasbourg in 1953, the experimental idea of protecting human rights only on the basis of the Constitution or the Convention has received a pan-European recognition. The ECHR case law is universally recognized in Europe and it holds an independent place in the continental system of law. Further consideration of the positions of the ECHR by the Anglo-Saxon legal system will serve as a progressive step towards improving the mechanism for the protection of human rights and fundamental freedoms.

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ZHURAVEL YU. M.

National University «Odesa Law Academy»,
Post-Graduate Student at the Department of Agrarian,
Land and Environmental Law

JUDICIAL PROTECTION OF LAND TITLE: ECHR PRACTICE

The article deals with the ECHR judgement «Zelenchuk and Tsytsyura v. Ukraine». The position of the ECHR on the land moratorium in Ukrainian legislation has been analyzed. Conclusions regarding the possible use of the mentioned judgement in national judicial practice have been made. The significance of the judgement in the light of the requirements of the moratorium cancellation has been studied.

Key words: *land ownership, land title, right to land, land moratorium, compensation, ban, cancellation.*

There is no doubt that land has always been a specific and important object of legal relations. Establishment of private right to land has a long and contradictory history. Nowadays legal science sets that the beginning of new era social relationships connected with land possession started with the adoption of the Ukrainian Constitution.

The science of land law has always paid special attention to Article 14 of the Constitution. The last states that land is the main national wealth that is under the special protection of the state. According to the requirements of this article ownership of land is guaranteed. This right is acquired and realized by citizens, legal entities and the state exclusively in accordance with the law [1].

However, land title and other legal relations connected with the process of acquisition of tights to land, its use and turnover still need clear legislation to be adopted and applied. Today, when one analyses legal reality comes to conclusion that citizens in their majority practically have no opportunity to effectively realize their rights. It means that a big number of rules, laws and other legal acts defective or contain mostly declarative provisions.

It forces citizens to go to court to protect their rights and legitimate interests. However, the national judicial authorities are not always able to apply the law correctly, or do so with significant violation, which in turn leads to a violation of the rule of law. In such cases, Ukrainians, having exhausted all possible national means of protecting their rights, are forced to seek help from international judicial institutions. A special role here is played by the European Court of Human Rights (here and after – ECHR).

Today, the most important for Ukrainian society is the decision of the ECHR in the case of Zelenchuk and Tsytsyura v. Ukraine. ECHR unanimously established violation of Article 1 of Protocol No. 1 (property protection) of the European Convention on Human Rights. The case concerned complaints of two people to a state ban on the sale of agricultural land, which, according to them, violated their rights to ownership as owners of such land plots. The Court noted that, after the fall of the Soviet Union, Ukraine predominantly distributed agricultural land to persons who had previously worked in collective farms, but introduced a prospective temporary prohibition on the sale of land, known as a "land moratorium". The Government argued that the measure prevented the concentration of land in several hands, stopped the impoverishment of the rural population and made it possible to ensure that the land remained cultivated. However, the Court has established that the state has not established a fair balance between the general interests of the community and the applicants' property rights. The court noted that no other state of the Council of Europe had such a ban, and relied on the inconsistency of Ukraine's approach to the moratorium termination. It was also unclear why a less restrictive measure was not effective for the same purpose. The court ruled that the government should take legislative measures to ensure the necessary fair balance for owners of agricultural land, although this did not mean that Ukraine should immediately create a market for agricultural land without restrictions. The applicants were not awarded any monetary compensation [2].

Since the repeated prolongation of the moratorium negatively affects a very large number of people, the ECHR has indicated that Ukraine should take measures for the implementation of this decision within two years and provide owners with the right to dispose of agricultural land. The ECHR did not award monetary compensation to applicants who are harming the moratorium, but indicated that it would not exclude the collection of such compensation from Ukraine in the future if the relevant measures for opening up the agricultural land market are not used.

The decision we are analyzing, indisputably, is a key precedent that to a large extent determines the further legal development of relations in this area. For example, it can be used in the following cases.

Compensation for damage caused by land moratorium. Owners of land plots (units) may apply to the courts of Ukraine with claims for damages caused by the inability to alienate a land plot at market price. Moreover, the fact of the illegal land moratorium is unnecessary to prove, since it is already established by the ECHR. However, suing to a court with a claim for damages would not have a chance of success until the ECHR awards compensation for damage on the application of the Ukrainian landowner. National courts, referring to their own decisions, may rely on the refusal of the ECHR to award compensation in the Zelenchuk and Tsytsyura v. Ukraine case, in order to save on the state the funds that could be paid to about seven million owners of agricultural land (shares) [3].

2. The permission of the court to alienate the land. Theoretically, obtaining from a court a permit for a transaction on alienation of land could be an effective mechanism for the protection of rights to land. The practice of Ukrainian legal proceedings already has its own precedents, when the period during which the prohibition of alienation of land activists acted has been shorted. This is reflected in Resolution of the Plenary No. 13 dated 25.12.1996 of the Supreme Court of Ukraine. At the same time, owners could apply to the court for a reduction of such a term, if they substantiate such a need (for example, unsatisfactory financial condition). Although there are currently no legal grounds for obtaining a court permit for the alienation of agricultural land, theoretically, with minor changes to land legislation, courts could decide to grant permission in cases similar to Zelenchuk and Tsytsyura v. Ukraine, which would be in line with Ukraine's commitment to the ECHR. [3].

3. The notary's obligation to certify the contract of alienation of land. The most realistic way to protect the rights of landowners may be to appeal to a court with a requirement to oblige the notary to certify a contract of alienation of land. As a rule, notaries do not agree to certify such agreements, referring to the land moratorium. In this regard, an appeal to court for the «legalization» of the alienation agreement, taking into account the conclusions of the ECHR in the case of Zelenchuk and Tsytsyura v. Ukraine, may form a judicial practice aimed at protecting property rights. Today, a number of lawsuits have been initiated on the obligations of notaries to certify agreements on the alienation of land, but it is rather difficult to predict the position of national courts [3].

Nevertheless, we hope that the mass appeal of landowners to courts in defense of their rights will allow the formation of a new judicial practice enshrined by the Supreme Court that the title to the land is immutable, and therefore if the owner wishes to alienate an agricultural land, the court must to allow to do it (to legalize the agreement) or to assign a decent compensation for losses. The first steps to overturn the land moratorium by national courts based on the decision of the ECtHR in the case of Zelenchuk and Tsytsyura v. Ukraine are already being made, in particular, on October 10, 2018, a decision was made on the suit of the prosecutor to refuse to invalidate the land plot contract that is subject to action land moratorium (case number 227/1505/18) [3].

The ECHR decision which is examined in this article is decisive, but its provisions are almost addressed to state authorities in Ukraine and are intended to ensure the prompt reversal of the land moratorium. In turn, representatives of the legislature should take all necessary measures to ensure and implement the rights of citizens by virtue of their rights and the legitimacy of their legitimate interests. Now, the decision to abolish the land moratorium depends more on the political will of the legislator. However, given the current situation in the state, unfortunately, it does not belong to the primary tasks of the parliament. Thus, the final resolution of the issue of legislative establishment of the abolition of the land moratorium will not take place soon.

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SECTION 4.
PRACTICAL INNOVATIONS IN THE FIELD OF INTERNET OF THINGS AND ARTIFICIAL INTELLIGENCE

YAVORSKA O. S.

Ivan Franko National University of Lviv,
Head of the Department of Intellectual Property,
Informative and Corporate Law, Doctor of Law, Professor

LEGAL PROTECTION OF A PERSON IN CONNECTION WITH HIS PERSONAL DATA PROCESSING: EU EXPERIENCE

Key words: *personal data, Constitution, EU Directive, principles.*

The right to personal data legal protection should be considered in connection with the constitutional right to non-interference in one`s private life and family matters (article 32 of the Constitution [1]), personal non-property rights fixed in the Civil Code as a constitution of private law, such as the right to information, the right to personal privacy and its secrecy, the right to personal papers, the right to the privacy of the correspondence [2]. In general, the national legislative approaches conform with the international ones, fixed in the General Declaration of Human Rights, Convention on Human Rights, International Pact on Civil and Political Rights.

Taking into consideration the informative technologies development, the problem of data protection is being actualized. Not often a usual passer-by has a clear idea about how, by whom and with what aim his personal data can be used. A person presents his own personal data while enjoying his right to labour, medical aid, education in accordance with the legislative requirements. Is this data properly protected from its further disclosure and application by the other subjects distinctive from those to whom it was granted according to the established requirements?

In the autumn of 2017 a leading firm which provides audit and consulting services «Deloitte» reported about the hackers attack which caused the data outflow both of the company employees and its clients. The data outflow was also possible due to the technical reasons in the system of corporate computer net protection. Large scandals concerning the usage of the personal data of the Facebook users by British company «Cambridge Analytica» showed that personal data protection is far from the desirable one. The private British company used the data analyzing technologies in order to elaborate the election campaign strategy and other social processes.

A scandal in Ukraine concerning the sale of the «Nova Poshta » clients personal data – an information about half a million people with personal data involving name, surname, city, passport data, email address and 18 million notations with less detalization involving only name, surname and phone number comes to mind.

The law «On personal data protection» [3] which was adopted in the context of Ukraine`s performance of the duty concerning the Treaty of the EU Association signature, partially solved a number of issues concerning personal data protection. It seems that the approach according to which data or totality of data about a person, who is identified or can be specifically identified, without an exact enumeration of it is personal data is absolutely correct. The rights of a subject of the personal data are established by the article 8 of the law. Among them is the right to know about the source of collection, location of one`s personal data, aim of its processing, location or place of residence either of the holder or manager of the personal data; to receive the information about the personal data granting permission conditions, in particular, the information about the third people to whom the personal data is being transmitted; to access to one`s personal data; to receive a response whether one`s data is being processed no later than 30 days since the request income, except for cases foreseen by the laws as well as to receive the content of such personal data; to present the motivated requirement concerning either shift or destruction of one`s personal data by any holder or manager of it in case this data is being processed illegally or is not authentic; to address a complaint on one`s personal data processing to the Authorized or court.

It is of great importance that every subjective right of a person should be corresponded by an appropriate duty either of a holder or manager of the personal data. For such duties not performance not only a civil responsibility in a form of inflicted losses reimbursement, an amount of which should be also proved, but public responsibility should be applied as well.

Decisive measures concerning this issue were taken in the EU. On the 27^{th} of April, 2016 a Regulation of the European Parliament and Council (General Data Protection Regulation) was adopted and EU 95/46 directive was abolished [4] .Until the adoption of Regulation, EU Directive, which, on the one hand was obligatory to every member-state, but on the other was reserving a choice of the form and the way of the result achievement to internal instances was in force. The Regulation has full legal power and is to be enforced directly by every member-state. The adjustment of the personal data relation in the Regulation supports the importance of the issue. According to the article 99: the Regulation is to be enforced since the 25^{th} of May, 2018.

Both the Directives and the EU Regulations are not boundary for Ukraine. However, their instructions are used as experience in formation the national legal base.

The validity of the personal data protection is attested by more than one hundred pages of the Regulation instructions, especially the instructions of the article 3 – territorial scope.

Its content attests the extraterritorial performance of the Regulation. Its instructions are applied to controllers or processors not established in the Union, where the processing activities are related to: the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or the monitoring of their behaviour as far as their behaviour takes place within the Union. A controller is a natural or alegal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data. A processor is a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller.

The main principles which are the basis of the personal data processing are the following: lawfulness, fairness and transparency, purpose limitation, data minimisation, accuracy, storage limitation, integrity and confidentiality.

Personal data processing is lawful if it is based on the person`s consent. Child personal data processing is lawful if the child is at least 16 years old. Besides, the controller shall be able to demonstrate that the data subject has consented to processing of his or her personal data.

The data subject shall have the right to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to the personal data and the following information: the categories of personal data concerned; the recipients to whom the personal data have been or will be disclosed; the envisaged period for which the personal data will be stored; where the personal data are not collected from the data subject, any available information as to their source. The Regulation states «the right to be forgotten»: the data subject shall have the right to the erasure of personal data, which should be carried out not only be the controller without undue delay, but another people to whom the data was transmitted.

The duties both of the controller and processor are strictly fixed. In particular, the controller shall implement appropriate technical and organisational measures to ensure and to be able to demonstrate that processing is performed in accordance with this Regulation. Those measures shall be reviewed and updated where necessary.

Taking into consideration the modern development level, costs on the realization, specifics, scope, context and purposes of processing as well as the risks of varying likelihood and severity for the rights and freedoms of natural persons, which are caused by the processing, the controller and the processor shall implement appropriate technical and organisational measures to ensure the safety level according to the risk.

Data protection certification mechanisms and of data protection seals and marks are being established, for the purpose of demonstrating compliance with this Regulation of processing operations by controllers and processors. The certification shall be voluntary and available via a process that is transparent. However, it does not reduce the responsibility of the controller or the processor for compliance with this Regulation and is without prejudice to the tasks and powers of the supervisory authorities. Particular attention is drawn to the formation, competence and interaction between the independent bodies of the member-states concerning the personal data protection. An origination of the European Council of data protection is foreseen as well.

According to the article 82 of the Regulation any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered.

Stiff sanctions (fines according to the 83 article) for not applying the Regulation instructions are established. Depending on the nature of the offence administrative fines up to 10 000 000 EUR, or in the case of an undertaking, up to 2 % of the total worldwide annual turnover of the preceding financial year, whichever is higher can be enforced. For separate kinds of offences the fine is up to 20 000 000 EUR, or in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher. Such an approach attests both the seriousness of the problems concerning personal data and the seriousness of the intentions to cope with them.

Applying any legislative instructions, in particular those directed at person`s rights and freedoms protection, should be ensured by the state coercion measures in case of their non-performance. If such instructions coincide with the subject inner will to act fairly, this is considered to be the ideal behavior model. However, the risks of the mismatch always exist. Therefore, the only way to reach the desirable model of the social behavior is a public responsibility for non-applying the legislative instructions.

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ENNAN R. E.

National University «Odesa Law Academy»,
Associate Professor of the Department of Intellectual Property Law and Corporate Law, PhD in Law, Associate Professor

THE CONCEPT OF DIGITAL CONTENT

Key words: *digital form, changes, Internet business, personal data.*

Currently, Internet users and Internet providers operate with the concept of «content», extending it equally both to the published work in digital form and to all the information that fills the Internet space. Thus, with respect to publicly available telecommunication networks that form the digital space, as well as various digital devices, they usually talk about information. To specify the subject of regulation, such information is called «content».

Recently, there has been a steady growth in the markets associated with the distribution of digital content: the music industry is increasingly focused on the distribution of digital music, video demonstration and video on demand service have become an important component of the film market, and revenues from electronic books compensate for the decline in sales of printed editions. The video game industry is experiencing particular growth, which quickly adapted to the changes that have occurred in business models. In addition to traditional computer games, ever-increasing multiplayer online games are gaining momentum, many of which are free, and revenue comes from selling various additional features and gaming equipment. This kind of free distribution of games is, among other things, an effective way to combat piracy.

In general, the emergence of the phenomenon of digital content owes its development to broadband access to the Internet: almost all copyright objects (works of literature, music, movies, computer programs) have acquired a new form of expression in digital form, which allows them to be freely distributed within – telecommunication networks. As a result, parallel systems for the distribution of copyright objects appeared: traditional (sale on material media) and digital (implementation of «electronic» copies, provision of remote access). In this case, the object of the contract is the same, only the form of its communication to the consumer changes. At the same time, despite the identity of the objects of the contract and the economic goal of the concluded contracts, their legal qualifications and legal regime differ significantly from the point of view of established practice.

Distribution of objects of copyright on traditional material carriers is carried out through contracts of sale of their copies, where the instance acts as a commodity. Distribution of copyright objects in digital form is usually carried out through license agreements that regulate the procedure and limits for the use of such digital content. At the same time, fundamental differences of legal regimes arising on the basis of these agreements are obvious. When an instance is acquired on a tangible medium, the right to use such an object is to a large extent regulated by law, in particular, the provisions on exhaustion of rights in cases of free use of the work. When acquiring digital content, its legal regime is established primarily by a license agreement or by means of a service agreement.

Works that exist in digital form have a number of features and significant differences from traditional works that affect their legal regime.

Information existing in digital form possesses a significant degree of independence from its carrier. Information can freely flow from one medium to another: from one computer to another, from a CD to a flash drive, etc. Information in analog form (printed versions of books, vinyl records, pictures, etc.), on the contrary, has a closer connection with the carrier, which makes it difficult to copy and transmit. The ease of distribution of digital content creates additional opportunities for rights holders, but at the same time creates additional incentives for illegal actions by reducing the technical barriers inherent in traditional media (the need for special equipment, time costs, etc.). This feature of digital information is especially enhanced by the specifics of the Internet, which ensures the ease and cheapness of information distribution without regard to its character. As a consequence, since what was previously available only with expensive equipment and other conditions, it became available to an individual. As a result, the right holders began to pay more attention to the control over the private use of the work.

The uninterrupted relationship between digital content and the process of copying it: in order to access it, a copy of the product or its fragment must be copied to the device being accessed. This copying takes place every time the browser reconstructs a page on a website or plays a file contained on it. Watching a movie, listening to music, viewing the text inevitably entail the occurrence of copies of these works or their fragments in the user's computer memory. On the contrary, when reading a printed book or watching a video tape, there is no additional copy of the work. This feature of digital content is inextricably linked with the basics of a computer, which is the main device through which it is “consumed”. Of course, the right should take into account such features, since in conditions when access to digital information is possible only through its copying, control over its copying means control over access to it. In an environment where the results of intellectual activities are increasingly taking digital form, intellectual property rights are gradually transformed from a means of protecting the rights of those who create intellectual and cultural values to the sphere of law governing access to information and knowledge.

The digital copy of the work is indistinguishable from its original. If each subsequent copy of an analog product was worse than the original (for example, rewriting audio or video tapes), then in the case of digital copies, we can speak of a potentially infinite number of copies indistinguishable from the original.

Digital information is plastic: it can be changed without any special difficulties. If making changes to a printed book or an analogue audio or video recording may not be so easy, making changes to the information on the website can be done without any problems. Such plasticity, in combination with the ease of searching for digitized information due to the possibility of its indexing, creates unprecedented conditions for creating derivative works based on it. For a person of the digital age, freedom means not only the freedom to express one's opinion, as well as not only the freedom to have access to information, but also the freedom to create, implying the right to process and transform the information received.

The possibility of simultaneous access and use of a single copy of the work in electronic form by many people. If an analog copy of a work (printed book or cassette) can potentially be used by a very limited circle of people at the same time, then a file hosted on the server can be used by a large number of subjects simultaneously. This creates the conditions for the distribution of digital content by providing access to it online, as well as by ensuring the availability of information resources in general.

Any person who has access to the Internet can act as a publisher of digital content. On the one hand, this entails unprecedented opportunities to bring their ideas and works to the attention of third parties without the participation of publishers, distributors and other intermediaries. On the other hand, the more content is available to the user, the more difficult it is for him to orient himself in this array and find the right one, as well as the more difficult it is to draw his attention to a specific object. For subjects of Internet business, the diversity of digital content entails turning the user's attention into a resource, the value of which is due to its limitations. User attention is becoming a special kind of product, which is reflected in new models of advertising, which is becoming more targeted and causes a number of problems in the field of the protection of users' personal data and their right to privacy.

KYRYLIUK A. V.

National University «Odesa Law Academy»,
Associate Professor of the Department of Intellectual Property Law and Corporate Law, PhD in Law, Associate Professor

CREATIVITY AND ARTIFICIAL INTELLIGENCE

Key words: *intelligence, artificial intelligence, computer, technology.*

Questions about the abilities of artificial intelligence are worried by humanity from the nineteenth century, from the time of research by C. Babbage, inventor of the first analytical computer, which was not destined to be realized due to lack of funding.

Today, society is concerned about issues related to ethical rules and legal regulation of the field of artificial intelligence; in the EU, Japan is developing commonly accepted rules in the field of artificial intelligence.

The above confirms that humanity is on the verge of change. The prospects for accelerating technological progress, the rapid development of artificial intelligence, neural networks, the integration of human with computer technology, and the enhancement of the abilities of the human brain at the expense of biotechnology – all this has called the science fiction writer Wendy to suggest in 1992 the concept of technological singularity, which, according to his predictions, should come about in 2030 as a hypothetical moment of complication of technological progress, after which it would be inaccessible to understanding.

At this time there are two approaches to constructing artificial intelligence, which are conventionally called algorithmic and with the help of self-study. In the first case, all the rules on which the intelligence operates is manually written, and in the second one an algorithm is created which itself learns on a certain large amount of data and allocates these rules independently. An algorithmic path that has its own positive aspects, such as predictability and ability to function within the programmed limits, has been defeated.

At the same time, artificial intelligence is built on the principle of self-learning, with the ability to develop and teach itself on the basis of the accumulated data, it allows you to act differently in similar situations, depending on previous actions, indicating that the potential of artificial intelligence remains uncertain and before the end is not explored. It should be borne in mind that the identification of artificial intelligence and robots is incorrect, since the latter are a form of embodiment and application of artificial intelligence.

At present, all the diversity of definitions of artificial intelligence can be reduced to the following three: weak artificial intelligence, strong artificial intelligence and artificial superintelligence:

«Strong artificial intelligence» (Strong artificial intelligence, ASI, proposed by philosopher John Searle, University of California, Berkeley, 1980), Artificial General Intelligence (AGI) is an artificial intelligence that is focused on solving all tasks that a person performs or can perform. Proponents of the theory of strong artificial intelligence believe that human thought is completely algorithmic, but it can be divided into a number of mathematical operations, and that engineers reproduce the human mind and create a truly self-conscious artificial intelligence, full of emotions and feelings that can fulfill any human task. But it must be emphasized that the developers of robotics and artificial intelligence should ensure that the person at any time will be able to control it.

«Weak Artificial Intelligence (WAI)», «narrow artificial intelligence» or «artificial intelligence» (Artificial Narrow Intelligence, NAI) is an artificial intelligence that is aimed at solving one or more tasks that a person performs or can perform . Lately, weak artificial intelligence is increasingly called Applied Artificial Intelligence (AAI). Proponents of weak artificial intelligence believe that it is possible to model human behavior, but artificial intelligence can never become a person because of the lack of self-awareness.

«Artificial superintellect» (Artificial Superintelligence, ASI, the term proposed by philosopher Nick Bostrom, Oxford Institute for the Future of

Mankind, 1998) is an intelligence that is much smarter than a better human intelligence in virtually every field, including scientific creativity, general wisdom and social skills. Assume also that he can have consciousness and have subjective experiences.

There are several approaches to the implementation of the idea of artificial intelligence, one of the most well-known and widespread – copying the work of the human brain (according to P. Wangu, this is the first version of the definition of the term – by structure). But, sharing the opinion of N. Bostrom, we believe that at the current level of understanding of the mechanisms of human brain work, this may somewhat restrict the search for possible variants of technological, algorithmic and programmatic construction of artificial intelligence. In our opinion, the most rational approach is seen in the detailed description of the functions of the brain (cognitive functions) of a person, functions of a rather high level of abstraction, which could be described in an algorithmic language. After such a description, there are wide opportunities for implementing the acquired algorithm for a specific brain function with a variety of software and hardware methods, methods and means that are known today or will be developed in the future.

Based on the foregoing, we will put forward the hypothesis that for legal science there is a sufficient representation of artificial intelligence in the form of a «black box», which is described by the function of «input-output», that is, the functional interconnection between input and output signals (information), which is equivalent a certain cognitive function of the human brain, but for which there is no known technical and technological details of the internal structure and functioning. In other words, if the input artificial intelligence is a set of some data, then the output according to a certain function can have information or «recognizable (recognized)» static or dynamic object (state of the object), which corresponds to this set of data, or about the result of the analysis (for example, correlation, cross-factor, etc.) of a large data set, or about the decision to change the position in the space of the states of the dynamic object (aircraft, the position of the firm in the market or the position of the state in foreign policy, etc.), or about the forecast of development with tuatsiyi or to change the purpose of operation and more.

This means that artificial intelligence carries out the processing (transformation) of the input information in accordance with the algorithms that implement the functions of the human brain, and knowledge pre-embedded in artificial intelligence or acquired in the process of self-development, into new information that can act as a direct or informational influence to manage some processes, or to act as source information for a new (next) stage of information processing.

Thus, artificial intelligence is a certain set of software and hardware methods, methods and means (computer programs) that implement one or more cognitive functions equivalent to the corresponding cognitive functions of a person.

Powerful development of robotics, artificial intelligence technologies, stable neural networks and cloud computing infrastructures, fuzzy systems technologies, entropy control, rooting intelligence, evolutionary calculations, etc. led the European Parliament to adopt the resolution of 16.02.2017 with proposals to the European Commission regarding the norms of civil law in the field of robotics, governing their production, use, autonomy and impact on society in 2016 (2015 / 2013INL).

Notable in the Resolution are the three laws of robotics, that is, the mandatory rules of conduct for robots, which were first formulated by A. Azimov in the story «I, the robot» (1941), as well as the zero law proposed by him in a later work «Works and the empire» (1986). The first law proclaims that a robot can not harm a person, or by his inactivity to allow a person to be harmed. In accordance with the second law, the robot must obey the orders of a person, with the exception of those who contradict the first law. According to the third law, a robot must defend itself, unless its actions are in conflict with the first and second laws. A zero law proclaims that a robot can not harm humanity or its inactivity to allow humanity to be harmed. At the same time, the document stresses that the said laws should be addressed primarily to developers, manufacturers and operators of robots capable of self-study and autonomous functioning, since the corresponding laws can not be translated into machine code.

Thus, responsibility for the implementation and observance of these fundamental ethical principles of the operation of robots has been postponed at the stage of their invention, production and use.

Thinking about the growing role of artificial intelligence, K. Bower of the Law School, Curtin (Australia), says that society is inclined to consider robots as an object, while if machines are able to make decisions and act on their own accord if they can cause harm or to be responsible for committing an action, it will be time for them to be treated not as an object of ownership, but as a person possessing some kind of rights.

The EU Resolution recognizes the increase in autonomous and cognitive abilities of robots (software that controls them), which translates them into more than simple tools and makes ordinary rules of liability, such as contractual and tort liability, insufficient. The question of the possibility of applying to complex robots of structures of a physical, legal entity (for example, corporation), animals or objects is analyzed. Taking into account the analysis conducted there is a proposal to give the most complex works the legal status of "electronic persons".

At the same time, given that computers still have a long way to go in line with human intelligence, it is suggested that the introduction of the category of «electronic entities» in the EU resolution is premature.

The EU Directive on liability for damage caused by work, provides for liability for damage caused by industrial defects, the responsibility of the manufacturer. Nevertheless, as scientists improve the skills of artificial intelligence to learn and adapt in a new environment in unpredictable circumstances, the manufacturer is more difficult to predict problems that could be harmful to work.

This issue does not lose its importance, given that scientists do not stop and continue to work on developing more sophisticated artificial intelligence. So, scientists at the Massachusetts Institute of Technology MIT, who have been engaged in such a development for more than a decade in a row, presented the artificial intelligence with the thinking of a psychopath killer named Norman, in honor of the character from the movie «Psycho» by Alfred Hitchcock – the murderer of Norman Bates.

Thus, the statement of I. Mask, recognizing along with the high benefit of artificial intelligence (during the diagnosis of cancer and the detection of suicidal behavior), the existence of the danger of its creation through the ability to learn, improve, solve problems and react without the participation of a person is actualized. However, no car can be taught to express emotions, to be guided by morals, to make exceptions, taking into account, for example, the repentance of a guilty person. According to I. Mask, the problem lies in the fact that human feelings are not subject to robots, but it is not known what conclusions can reach the cars that will make them uncontrolled and dangerous as nuclear weapons.

In view of the above, the EU Resolution contains proposals for amending legislation in the event of complication of robotics, its development, the growth of its sophistication, in proportion to the autonomy of robots and the reduction of producers' liability, and the introduction of compulsory liability insurance «without fault».

The proliferation of autonomous mechanisms updates a number of issues regarding legal liability for damages caused by autonomous means of transport, and the possibility of litigation against robotic surgeons.

On the one hand, it is obvious that the responsibility lies with the manufacturers, but there may be difficulties with their identification. If open source software is used by stand-alone vehicles, who will be the defendant and who will be prosecuted if there are millions of «creators» around the world?

In the field of creativity, developers also seek to improve the activities of artificial intelligence. The development of software that creates soundtracks for videos that are no different from natural sounds, robots capable of reproducing a handwriting that is no different from the human, artificial intelligence that wins in the best players in the world of poker is under development.

Facebook develops artificial intelligence that can process and reproduce music from one genre to another, using different musical instruments, by encoding. For example, recording a symphony orchestra performing Bach, turning it into a piano performance.

That is, technologies create not only possibilities for reworking existing works or expanding people's ability to create works of art with software in a new way, but about creating technologies that allow computers to create new works without practicing human involvement.

Acknowledging the rapid growth and development of artificial intelligence, A. Braid says that society is gradually, but rightly, moving in the era of digital authorship, where artificial intelligence will relatively autonomously generate (create) works that will not be different from the works of human authorship.

The question of the possibility of recognizing and protecting works generated by the computer, new intellectual property objects and copyrighted works remains controversial, since creativity has so far been recognized only by man.

Scientists from various fields of science are discussing the possibility and probability of creating artificial intelligence, able to create creative objects in the same way as a person. The solution to such a question is compounded by the lack of a unified understanding of the notion of creativity in the field of jurisprudence and other branches, and the content of the definition. If creativity is understood from the point of view of human consciousness, at least as in copyright law, then in such conditions, machines will never be able to achieve it, regardless of their complexity, skills and abilities.

Skeptics of the possibility of creating strong artificial intelligence quoted Adu Lovelace, the daughter of Lord Byron, who worked with Charles Babbage and in 1843 warned against excessive optimism about the potential of the developed analytical mechanism, and recommended avoiding exaggerated ideas about the possible abilities of this mechanism.

Acknowledging the achievements of substantial progress and technological advances since the speech of A. Lovelace, it has not lost its relevance yet. Despite the fact that today's computers are more powerful than their predecessors in terms of memory and data processing, they still rely on people who set the rules on which they are futile. Just as a photographer makes a photo, standing behind the camera, programmers are behind the development of each software and neural network. According to A. Lovelace, people create rules, and artificial intelligence follows them, only acting within certain limits.

Taking into account the above, given the rapid development of technology, the issue of legal regulation of artificial intelligence and the generation of creative objects by computing technology becomes more relevant and requires further research.

MAZURENKO S. V.

National University «Odesa Law Academy»,
Associate Professor of the Department of Intellectual Property Law and Corporate Law, PhD in Law, Associate Professor

LEGAL PROBLEMS OF SUPPLY OF THE CYBER SECURITY

Key words: *cyber security, cybercrime, cyber threat, cyber defense, Internet, website.*

In the Great Explanatory Dictionary of the Ukrainian Language, the terms «cyber» or «cybernetic» are interpreted as referring to the term «cybernetics», which is created and operates on the basis of the principles and methods of cybernetics. And the term «security» describes a state where someone does not threaten anyone, that is, characterizes the absence of danger [1]. The basis for the introduction of the term "cyber security" was the understanding of the need to address the problem of neutralizing or minimizing the totality of cyber threats. From the technological point of view, cybersecurity is an integral part of information security, since the nature of threats, methods, means and measures is the same and cybersecurity concerns only cyberspace. From another point of view, the term «Cyber Security» is considered as a separate case of information security, the introduction of which is due to the use of computer systems and networks (KSM) and/or telecommunication networks (TCM). «Cyber Security» as the security of information and infrastructure in the digital environment that it provides involves achieving and maintaining security features in the resources of the organization or users aimed at preventing relevant cyber threats. The analysis of the main factors that adversely affect the functioning of computer systems and networks and/or telecommunication networks has shown that there are a number of factors that cause the risks of cyber threats to their functioning and the need for their protection against cyber attacks [2].

O.A. Baranov suggests, under cybersecurity, a separate case of information security, the appearance of which is due to the use of computer systems and / or telecommunication networks. In an expanded state, the author suggests, under this term, to understand «such a state of protection of vital interests of the individual, society and the state in the use of computer systems and / or telecommunication networks, which minimizes the task of harm to them due to: incompleteness, timelessness and unlikelihood of information that used; negative information influence; negative consequences of the functioning of information technologies; unauthorized distribution, use and violation of the integrity, confidentiality and availability of information» [3].

The importance of the problems of cyber security led to the adoption in Ukraine of the Law «On the Basic Principles for the Cybersecurity of Ukraine», which defines the legal and organizational foundations for ensuring the protection of the vital interests of man and citizen, the society and the state, the national interests of Ukraine in cyberspace, the main goals, directions and principles of state policy. in the field of cyber security, the powers of state bodies, enterprises, institutions, organizations, individuals and citizens in this area, the basic principles of coordination of their activities with Cybersecurity. According to Art. 1 of this law, cybersecurity is understood as the protection of the vital interests of man and citizen, the society and the state during the use of cyberspace, which ensures the sustainable development of the information society and the digital communication environment, timely detection, prevention and neutralization of real and potential threats to the national security of Ukraine in cyberspace [4].

The law also defines terms such as: «cyber threats» – the existing and potentially possible phenomena and factors that pose a threat to the vital national interests of Ukraine in cyberspace, have a negative impact on the state of cybersecurity of the state, cybersecurity and cyber defense of its objects; «cyber defense» – a set of organizational, legal, engineering and technical measures, as well as measures of cryptographic and technical protection of information aimed at preventing cyber incidents, detecting and protecting against cyber attacks, eliminating their consequences, restoring the sustainability and reliability of the functioning of communication and technological systems; «cybercrime» (computer crime) is a socially dangerous offense in cyberspace and / or its use, liability for which is provided for by the law of Ukraine on criminal liability and / or recognized as a crime by international treaties of Ukraine.

In paragraph 14 of the report of the Committee of the 2nd Tenth United Nations Congress of 2000 on the Prevention of Crime and the Treatment of Offenders, it is noted that there are two categories of information crimes: cybercrime in the narrow sense («computer» crimes) – any unlawful act committed by way of electronic operations, the purpose of which is to overcome the protection of computer systems and data processed by them; cybercrime in the broadest sense (computer-related crime) is any unlawful act committed by or in connection with a computer system or network, including such offenses as unlawful storage, offering or distribution information through computer systems or networks [5].

According to N.M. Dimitrova, in contrast to the traditional types of crimes, whose history includes centuries, such as murder or theft, cybercrime phenomenon is relatively young and new, which arose with the advent of the Internet. The specificity of this type of crime lies in the fact that the preparation and commission of a crime is carried out almost without leaving the «workplace», the crimes are accessible, since computer technology is constantly cheaper, crimes can be committed from anywhere in the world, which settlement, and objects of criminal encroachment may be thousands of miles away from the perpetrator. In addition, it is rather difficult to detect, capture and remove forensic-meaningful information when conducting investigative actions to use it as evidence of material [6].

The main types of cybercrime NM Dimitrov considers: violation of copyright and related rights; fraud; avoidance of taxes, duties (mandatory payments); illegal actions with transfer documents, payment cards and other means of access to bank accounts, equipment for their production; import, manufacture, sale and distribution of pornographic items; illegal collection for the purpose of using or using information constituting commercial or banking secrets.

In general, one can identify the following main features that distinguish cybercrime from other criminal offenses: the commission of such crimes does not require the physical rapprochement of the subject of crime and victim; Thanks to automation, the number of objects of a crime can be measured by thousands, as a result of one criminal act; such crimes are committed «instantaneously», so a quick reaction of the relevant authorities is required; lack of a stable algorithm for committing actions that lead to unlawful consequences, due to insufficient research.

To date, the terminology of cybercrime and crime in the Internet network should not be considered. Scope of Internet crime – the so-called virtual space, which can be defined as computer-simulated informational space, which contains information about individuals, objects, facts, events, phenomena and processes presented in mathematical, symbolic or any other and are in the process of moving on local and global computer networks, or information stored in the memory of any physical or virtual device, as well as another medium specially designed for their storage, processing and before chi.

The specificity of crime on the Internet is as follows: relative comfort, that is, cooking and committing a crime is carried out practically without leaving the «workplace»; availability – in connection with the tendency of constant decrease of prices for computer equipment; wide geography of crimes, but given the fact that the majority of computers are located in large settlements, it is precisely for them that the «lion's share» of crime; the distance of the object of criminal encroachment – it can be thousands of kilometers from the place of the crime; the complexity of detecting, fixing and extracting forensic-meaningful information (the trace of a crime) in carrying out investigative actions for using it as evidence of evidence, etc., etc .; wide use of criminals of information encryption tools [7].

The main condition for the termination of offenses committed with the use of the Internet is the establishment of the offender. After establishing contact with the offender and obtaining an unlawful offer, the technical capabilities of the network establishes his place of residence and the computer he used.

Thus, the establishment of an attacker's person, after receiving information about the illegal activity on the Internet, is directly related to the installation: the IP address under which the computer worked on the Internet; Internet Service Provider, whose network belongs to the IP address, which used the unlawful implementation of pornographic products; Establishing the location of a personal computer that had access to the Internet at a specified time under the installed IP address.

Thus, the information on the distribution or sale of pornographic items contained on the relevant website is physically located on computer equipment, which, while working on the Internet, uses a universal IP address – an identifier. In addition, a website that hosts similar information, in addition to the IP address, has a web address, an alphanumeric designation called a domain name and also unique to the Internet.

Thus, in recent years, the issue of cyber security has become particularly relevant to Ukraine. The spread of cyber-threats led to the activation of the legislator in this area, which resulted in the adoption of a number of regulations, clarifying terms, forming the system of bodies responsible for such security, increasing the responsibility for cybercrime. Today, cybercrime is to mean a socially dangerous act in cyberspace and/or its use, the responsibility for which is provided for by the law of Ukraine on criminal liability and/or recognized as a crime by international treaties of Ukraine, and under cybersecurity – the protection of vital interests of man and citizen, society and the state during the use of cyberspace, which ensures the sustainable development of the information society and digital communication environment, is timely discovered prevention, and neutralization of real and potential threats to the national security of Ukraine in cyberspace.

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NEKIT K. G.

National University «Odesa Law Academy»,
Associate Professor at the Department of Civil Law,
PhD in Law, Associate Professor

THE IMPLEMENTATION OF INFORMATION SECURITY AND PERSONAL DATA PROTECTION IN THE FIELD OF THE INTERNET OF THINGS

Key words: *personal data, European Union, GDPR, software.*

At the end of the twentieth century, the history of humankind was divided into two eras due to the emergence of the Internet. And the speed in the development of technology is gaining so fast, that today, at the beginning of the XXI century, we can talk confidently about a new era in our history – the era of the Internet of things. The number of devices connected to the Internet was 500 million in 2003, by 2010 their number had increased to 12.5 billion, and by 2020, according to various sources, Internet connections from 26 to 50 billion devices are predicted [1]. On the one hand, it opens up tremendous prospects for the development of society, but on the other hand, like any other new phenomenon, it gives rise to a number of issues. There are some issues in the legal sphere as well, because today we have no comprehensive solution regarding the legal regulation of relations in the field of the Internet of Things.

One of the most important issues in the field of the Internet of Things is the issue of personal data protection.

In order to ensure the personal data protection in the European Union, new rules for the processing of personal data were developed and the

General Data Protection Regulation (GDPR) was adopted (Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC). According to that Act, companies that violate the rules for processing personal data risk being held accountable with fines of 20 million euros, or 4% of the company's annual income. The basic principles for processing personal data on GDPR are as follows:

1) personal data must be processed legally, fairly and transparently. Any information about the purposes, methods and amounts of personal data processing should be expressed as accessible and simple as possible;

2) target limitation: data should be collected and used exclusively for the purposes stated by the company (online service);

3) data minimization: it is impossible to collect personal data in a larger volume than is necessary for processing purposes;

4) accuracy: personal data that are inaccurate must be deleted or corrected (at the request of the user);

5) storage restriction: personal data should be stored in a form that allows the identification of data subjects for a period not longer than necessary for processing purposes;

6) integrity and confidentiality: when processing data of users, companies are obliged to ensure the protection of personal data from unauthorized or unlawful processing, destruction and damage [2].

The great importance for the development of innovations in the field of the Internet of Things are the so-called innovation-friendly rules enshrined in the GDPR. This rules are called Privacy by Design or Data Protection by Design. According to these rules, data protection guarantees in products and services that are being developed must be provided at the design stage. The basic principles of Privacy by Design are:

1) the necessity to take preventive measures, not just the elimination of consequences: the embedding of confidentiality in the design of the system should be active, and not limited to elimination of consequences. This approach should prevent the breach of confidentiality before it occurs. In other words, personal information must be protected before the system begins to work, and not after identifying breaches of confidentiality;

2) confidentiality as a standard setting: Privacy by Design seeks to achieve the maximum degree of protection of personal information, ensuring that personal data is protected automatically in a particular information system or business relationship. Even if an individual takes no action, his personal information remains secure. No action is required from the individual to protect personal information – the system initially contains the necessary settings;

3) confidentiality as a part of the structure: the protection of personal information should be an integral part of the architecture of any information system or business relationship. This should not be an additional component, introduced into the system post-factum;

4) protection of personal information throughout the entire cycle of its collection, storage, processing and destruction: confidentiality must be embedded into the system even before the data collection begins. Moreover, this protection must reliably extend over the entire data storage and processing cycle. In other words, the data preservation is important for confidentiality from the moment the system starts up to the end of its existence. This ensures reliable data storage, and after the end of its use – reliable and timely destruction;

5) accessibility and openness: all components and operations remain open and accessible, both for users and for those who provide this type of service;

6) respect for user privacy: the system should be user friendly. This is achieved by such measures as the protection of personal information by default, timely notification of the collection of personal information, giving the user the freedom to choose in a convenient and understandable way [3].

The above mentioned provisions on the personal data protection should be taken into consideration by the Ukrainian legislator. This is necessary both to ensure the protection of personal data of Ukrainian citizens through the adoption of a similar act, and taking into account the extraterritorial nature of Regulation (EU) 2016/679. The extraterritoriality of the GDPR means that this act applies to all companies that process personal data of citizens and EU residents, regardless of the location of such a company.

The problem of ensuring information security in the field of the Internet of Things requires close attention. One of the key tasks for ensuring information security in the field of the Internet of things is to take responsibility for this issue by the professional community. It is assumed that self-regulation and certification of devices belonging to the Internet of Things system will be able to help in ensuring information security.

The problem of reconciling the coexistence of the various components of the Internet of Things will help to solve the introduction of certain standards in the field of the Internet of Things. Proprietary and closed IoT systems must give way to open space. The situation when there are many different non-standardized devices is similar to the situation when each car manufacturer uses its own control system, a steering wheel would be installed in one car and a joystick or a control panel in the other. Or if it would have been impossible to call other operators by phone, and for household appliances of various brands, different types of water or electricity connections would be needed. Similarly, in the world of the Internet of closed or proprietary Things, in which devices are not connected to each other, the home owner will not be able to control the lighting, security system, thermostat, locks, etc. using a central application or control panel. Today the need for standards for the Internet of Things is increasingly recognized. For this purpose, the Association for Standardization has developed a number of standards and protocols designed to support the development of connected systems [4, p. 120-121].

It should be mentioned that excessive government intervention in the regulation of relations in the field of the Internet of Things may hinder the development of technology. Considering that, to ensure information security in the field of the Internet of Things it is necessary, first of all, to apply self-regulation, which should be ensured through close cooperation between technology companies and civil society. This minimizes government intervention in this area, which will contribute to the rapid development of innovative technologies. There is only the need for legal regulation of relations between civil society, consumer protection organizations and technology companies. First of all, efforts should be directed at protecting human rights from violations related to the functioning of the Internet of Things. It is necessary to prevent such violations by monitoring the installation of proper protective software on all devices connected to the Internet.

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MUZYKA V. V.

National University «Odesa Law Academy»,
Post-graduate student at the Department of European and International Law

USING ARTIFICIAL INTELLIGENCE IN JUSTICE SYSTEM AND THE MAIN CHALLENGES TO HUMAN RIGHTS REALIZATION

This article examines the issues of the operation and use of AI-powered systems and algorithms in justice system, and the main concerns they raise. It also analyses the most relevant examples of AI use, its ability to predict and the factors associated with predictive justice that may negatively affect human rights. Notwithstanding all the concerns, it is argued that AI-powered systems or algorithms may be used in harmony with human rights standards.

Key words*: artificial intelligence, AI, human rights, predictive algorithm, AI-judge.*

The reality of the world «as it is» is such that artificial intelligence (AI) might play a greater role than we think. Peoples all around the world use it in their everyday lives because AI brings obvious benefits, improve our lives and even makes us happier. However, relying enormously on AI may also destroy people`s lives, violate human rights or heavily restrict them [1]. This is a key reason why various legal issues concerning the use of artificial intelligence and its compliance with human rights standards merit considerations.

Today AI systems may not only understand but also predict human behavior, what increases the desire to make use of it. But only few persons know how algorithm operates, whether it could provide unbiased results and what safeguards are implemented in a system designed, if any.

To exemplify some potential problems associated with the application of artificial intelligence, one must consider the leading case on this issue – the Loomis case. In 2017 Eric Loomis failed to challenge the decision of the Supreme Court of Wisconsin in the State v Loomis case. He did not succeed in overturning the decision of the Wisconsin Supreme Court concerning the use of COMPAS, risk-assessment software, in criminal sentencing. That algorithm considered Loomis as high risk for all the three types of recidivism: pre-trial, general and violent recidivism [3, para. 15]. The State representative emphasized all types of recidivism had to be considered since «all of these are factors in determining the appropriate sentence» [3, para. 18]. The Court in the person of Judge Scott actually did it by emphasizing at the hearing that «[t]he risk assessment tools that have been utilized suggest that you're extremely high risk to reoffend» [4, p. 18].

The main problem is that COMPAS was proprietary risk assessment software. It means the accuracy of scores could not be challenged because no one knew why Loomis was designated high risk and how this program calculated risks. Moreover, COMPAS was designed to calculate all scores by relying on gender of a suspect and on data about a similar data group («norming» groups) [3, para. 15]. Loomis thus insisted that his right to be sentenced based on accurate information, the right to individualized sentence and the right to be free from discrimination were violated [4, p. 18-19]. Indeed, there is still a room for discussion whether or not risk assessment played a determinative role in making a final decision. Whatever it was, it is certain that judges took into consideration the risk-assessments results despite COMPAS has been developed for the use of a particular state department, not for courts.

This decision has been criticized by human rights defenders and other activists, and raised serious concerns. First, the reliance of AI algorithms depends on the data they are trained on. If these data are biased, algorithm will be biased as well. And in the case mentioned, relying on gender and race did not (or hardly) serve the interests of justice. Moreover, if the cost of error is a human life, a person should know what factors are determinative for predictive algorithms and should be given the reasoning, which is behind the court decision to impose a particular criminal sanction.

Importantly, in 2016 a special project to predict *ex ante* decisions of the European Court of Human Rights revealed that AI system was able to predict its decisions with 79% accuracy in 584 cases. The most decisive factors for prediction were facts of each case. As regards to data set, it contains all the relevant cases associated with the application of Article 3 (prohibition of torture), 6 (fair trial) and 8 (respect to private and family life) of the European Convention on Human Rights. AI-powered machine also relied upon the text extracted from sections or subsections of each case [2]. The result achieved raise an important question: whether or not the model of decision-making of AI-judges, which best match legal realism, is acceptable and may be applied to all cases.

Though in case with ECHR, it was no more than an experiment, there are some states that seriously think about using robo-judges at national level. For example, Estonia is about to use AI-judge in near future. Documents relating to a particular case will be fed into the robo-judge, which will analyze them and make a final decision. Since this project needs improvement, advice from practitioners will be considered for the purpose of refinement of the operation of a robo-judge [5]. Furthermore, an AI-powered judge is expected to deal with small legal disputes (of less than €7,000) and its decisions may be challenged before a human judge.

In any case, the impact of artificial intelligence systems and algorithm on the enjoyment of human rights depends on states that should impose legal framework and private sector that are responsible for its development. As noted Dunja Mijatović, European Commissioner for Human Rights, «the right balance between technological development and human rights protection» is what we need [1].

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PODOLIEV A. O.

National University «Odesa Law Academy»,
Post-Graduate Student of the Department of Intellectual
Property Law and Corporate Law

INTERNET OF THINGS: IP LAW NOVELTY

Key words: *Internet of Things, IoT, IP protection for IoT, patents in Internet of Things, IP law novels.*

The concept of the Internet of Things is rather new not only in the domestic landscape, but also in the world. First time this term was formed by the British pioneer Kevin Ashton during his collaboration with Procter & Gamble. The entrepreneur used the term 'Internet of Things' to describe a system where the Internet, which had already had a huge impact in the world in the late 1990s, would be linked to the physical world of people through a variety of sensors that could be located everywhere.

Internet of things (IoT) is a network of everyday devices, appliances, and other objects equipped with computer chips and sensors that can collect and transmit data through the Internet, including for instance devices such as smart watches, smart toys, smart home devices and connected cars. This presentation analyses the IoT and intellectual property law in the existing European legal framework from copyright law, patent law and trade mark law perspective [1].

'IoT' includes a network of devices and devices that contain built-in sensors, actuators, electronics drives and software that allows these objects to receive and transmit information and data. IoT is a peculiar process of interaction of things in the physical world via the Internet [2].

IoT allows devices not only to store data, but also interact with each other, coordinate and make decisions independently on the basis of information analysis. Smartphones have changed the very model of behavior of our personal life, and Internet of things makes «effective» almost every subject around us. Intelligent buildings, intelligent systems implemented in factories, logistics, security systems, the medical sector, autonomous vehicles, city-level infrastructure and urban planning are just a shortlist where IoT is already implemented and in active use.

The idea of the Internet of things has become the result of advanced concepts of the last twenty years, including a wireless network throughout the planet with the help of satellites, widespread communication, comprehensive computing and artificial intelligence. This vector of technology development progress has led to its' was their unconditional and deep integration into the economic, public and private life of each of us [3].

While protecting intellectual property rights for the Internet of Things it is worth considering, that it is complicated by the multi-level structure of the ecosystem in which the devices are located, as it concerns not only the sensors contained in devices and software that allows interacting with each other devices, but also the devices and technologies themselves on which they are built.

In order to successfully work with other systems (interacting with each other), IoT devices produced by different manufacturers should be able to work together – which means that there are a large number of patents that overlap each other. And with the number of components and elemenets of each single device, even a small IoT system can have thousands of active patents covering a multitude of functions of each single element, thus, after patenting the invention in the IoT, it will be very difficult to avoid a large number of claims from patent holders associated with devices that make up the complete network.

New participants in the market should take into the account that many established players already own significant intellectual property (IP) in one or more of the spaces. First of all, newbies need not only analyze which patents are already included in the newly-built IoT ecosystem, but also consider where the possible infringement risks lie.

IP protection on IoT sets challenging tasks to the IP strategists unlike other computer-related technologies. The best way to start is to carefully write patent claims, which will help so that they only require a single actor to perform all steps.

The decision of Alice of the Supreme Court explained that a simple implementation of an «abstract idea» on a computer would not be acceptable. On the other hand, an invention that involves controlling a group of physical object provides an improvement to an existing technology or is not just an ordinary and usual solution to a known problem, is not «abstract» and will be eligible for patenting [4].

Moreover, composing a wide patent application may provide more opportunities for filing a claim for patent infringement in the future. However, it is important to know that the patent office may narrow the breadth of your claim during its review due to Alice and some other recent decisions of the Supreme Court.

Patent application as an explanation of how your product works includes not only technical aspects of product, but also commercial value of your patent which is based on the potential profits arising from new products or services that can/will incorporate your novel ideas. This makes it important to build your patent application around the reason that your invention’s novelty matters, and to state what its commercial potential could be.

Obviously, IoT will put some pressure on IP relations. This is connected both with the complex multi-level system of patents within the IoT ecosystem, and with the relative novelty of all inventions in this area. The most important moments for those who want to protect their invention in the IoT is to fill a patent application early describing a specific novelty of their system, while avoiding lower level patents. This way you can avoid a lot of litigation with the manufacturers of physical elements on which IoT system is built. Moreover, early patenting will provide potential profit in case of product success in the future.

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PODOLIEVA A. I.

Taras Shevchenko National University of Kyiv,
Graduate Student of the Department of Intellectual Property of Law Faculty

LEGAL MECHANISMS OF CONTENT PROTECTION FOR UNLAWFUL USE IN THE INTERNET

Key words: *framework, digital processes, restriction, Internet.*

In the current framework of globalization of digital processes, the Internet has become the largest and the most powerful platform in which a huge amount of information is concentrated. This situation has two diametrically opposite consequences, on the one hand, the world has huge opportunities to use any content, and on the other hand, right holders or content managers, despite the existence of legislative attempts to regulate this area, almost no protected against unlawful and illegal using the content they created.

It should be noted that in Ukraine for a long time the legal regulation of relations related to the Internet network was left to the attention of the legislator. Following the events of 2014, legislation began to appear in the Verkhovna Rada of Ukraine, which have been aimed at limiting the use of certain content on political grounds. Interestingly, by 2013, Freedom of the Net, which is being formed by the international human rights organization Freedom House, Ukraine was a country with free Internet. But after 2014 (as of 2018 inclusive), Ukraine in this rating has gone to the group of countries with «partially free» Internet.

Obviously, such restrictions in the online environment in Ukraine have someting to do with the blocking of pro-Russian or pro-separatist web pages, but not with the unlawful use of content that manifests itself in violation of intellectual property rights.

Nevertheless, these circumstances, among other things, became an impetus for the promotion and adoption of laws aimed at regulating the relations related to the protection and protection of the rights of users of the Internet, the content placed by them, which may contain as objects of copyright rights, related rights, and other objects related to intellectual property.

Actually, only since March 2017 (with the adoption of the Law of Ukraine «On State Support to Cinematography in Ukraine» [2]) the modern legal regulation of this sphere began.

It should be noted that the current legislation of Ukraine, in particular, the Law of Ukraine «On Copyright and Related Rights» [1] does not contain such term as «content». However, Article 1 of this Law defines the term «web page» as part of a website that may contain data, electronic (digital) information, other copyright and (or) related rights objects, etc. Such a wording completely covers the definition of the concept of «content».

In Ukraine, copyright holders have a wide range of technical and legal means of controlling the works posted on the Internet before the violation of their rights. Technical means of copyright protection on the Internet are divided into two ways of identifying copyright and related rights objects, access restrictions, cryptographic transformation, etc. The choice of method of protection depends on the nature of the work to be protected.

Identification of copyright and related rights objects in most cases is carried out using the ISBN identification code, digital signature, digital mark (Digital Watermark, Digital watermark).

The most common form of product protection on the Internet is the «digital watermark» that is introduced into the works (texts, graphic images, etc.) on the Internet. Their main advantage is that during the viewing a standard visual image, the user does not see any encoded designations – copyright © marks, author's name, year of publication. However, when applying a particular software tool, you can set that the files contain additional information indicating the person who wrote it. It is also possible to use special «prints», which also allow you to control the use of copyright objects on the Internet [3].

Among other ways of protecting copyright and related rights on the Internet are the restrictions on access to materials placed on the Internet, providing access to the Internet resource at a prepaid fee. It is also possible to use so-called «digital envelopes», envisaging the conclusion of an agreement with the owners of certain resources in the network. In addition, you can use content cryptographic conversion methods, such as encryption, to restrict or completely exclude the possibility of copying copyright objects (for example, a SCMS system that allows you to make only one copy of a document and prevents further copying of this instance the product) [6].

Another way of protecting content from misuse in the Internet, which is quite actively used in the world, but for some reason in Ukraine is still not popular, is to create web-depositaries that allow the recording of copyright and related rights in the Internet and to consolidate their legal status.

You should also highlight a content security system used by YouTube's renowned video hosting. The YouTube Copyright Center has four good faith criteria, as exemplified by US copyright law: the nature and purpose of the content, the nature of the copyrighted work, the number and significance of the used part of the entire protected work, and the result of the use of the protected material for the potential market or revenue of the right holder. In each case of suspicion of copyright infringement, these criteria are used by courts in each individual case individually.

The most effective and widespread way of using and simultaneously protecting copyright is the licensing of works, which allows you to protect all or only a portion of copyright, depending on the choice of the copyright holder. Thus, one of the most famous Internet users is the Creative Commons nonprofit organization that offers licenses for works that allow you to retain some of the copyright and at the same time grant other users the right to use them in works in the cases specified by the copyright owner. The main purpose of this organization is to preserve the idea with which the Internet was created – the idea of universal access to the research, educational, and cultural achievements of all mankind. Also, there is no violation of the copyright of the use of materials that are public domain [5].

In Ukraine, in comparison with other categories of disputes, the jurisprudence on disputes in the field of copyright infringement is insignificant, while there is a huge amount of Ukrainian-language web content with content that is distributed without the consent of the right holders and contrary to their will (so-called "pirate" content), which suggests a low level of protection of the rights of owners of copyright objects.

Although the current legislation of Ukraine and includes provisions aimed at regulating mechanisms to protect rights holders, such a mechanism of copyright protection on the Internet, unfortunately, does not solve all the problems faced by the person whose rights have been violated. Among such problems are distinguished:

1. The problem of determining and establishing an appropriate defendant in a case. The question of who is the proper defendant in cases involving copyright infringement on the Internet is very important and ambiguous. Courts are different in approach to the question of determining the proper defendant in the case: the claim can be filed either with the person who directly posted the relevant content on the Internet, either to the hosting provider, or both.

2. The problem of determining the place of commission of the violation. In accordance with the provisions of national law, a person who has suffered harm in connection with a copyright infringement has the right to claim compensation for the damage caused. National courts proceed from the fact that property liability for infringement of copyright comes in the presence of certain conditions established by law: the fact of the wrongful conduct of a person; damage to the subject of copyright and (or) related rights; causal link between the harm done and the unlawful conduct of the person; fault of the person who caused the damage. However, taking into account the extraterritorial nature of the Internet, as well as in the event that a foreign element is present, it is very problematic to establish the place of the violation.

Thus, despite the legislative changes introduced in 2017 in regulation of the issue of the protection of works on the Internet, new challenges of technological development stimulate the formation of new approaches to the protection of copyright in the Internet.

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SECTION 5.
SCIENTIFIC CONCLUSION, LEGAL EXPERT OPINION, FORENSIC ANALYSIS

LUTSYUK P. S.

Member of the High Qualifications Commission of Judges of Ukraine,
Doctor of Law, Honored Lawyer of Ukraine

SCIENTIFIC CONCLUSION IN THE FIELD OF LAW

Key words: *scientific opinion, Constitutional Court, Scientific conclusions.*

The term «scientific opinion in the field of law» is not found in the procedural codes or case law, as opposed to the term «expert opinion in the field of law». However, its absence in legislative acts does not mean absence in the field of jurisprudence. In addition, the scientific conclusion has a significant auxiliary value for the proper administration of justice.

Laws of Ukraine «On the Constitutional Court of Ukraine» and «On the Judiciary and Status of Judges» still define the concept of «scientific conclusion». At the Supreme Court and the Constitutional Court of Ukraine, according to the law, scientific advisory councils are formed from highly qualified lawyers whose purpose is to prepare scientific opinions on the activities of the Constitutional (Supreme) Court, which require scientific support.

In accordance with the provisions of the Scientific Advisory Board of the Supreme Court, approved by the Resolution of the Plenum of the Supreme Court of February 2, 2018, No. 1, its powers include, inter alia:

– preparation of scientific conclusions regarding the interpretation and application of the law;

– participation in the preparation of draft generalizations of the practice of courts applying the rules of material and procedural law in order to ensure their uniform application during the consideration of cases;

– preliminary consideration of draft resolutions of the Plenary Session of the Supreme Court regarding the provision of advisory explanations on the application of the laws of Ukraine by the courts during the consideration of cases;

– preliminary consideration of the draft conclusions of the Plenary Session of the Supreme Court concerning draft legislative acts relating to the judicial system, judicial proceedings, the status of judges, execution of court decisions and other issues related to the functioning of the system of judicial system of Ukraine;

– preliminary consideration of draft constitutional petitions of the Supreme Court to the Constitutional Court of Ukraine regarding the constitutionality of laws and other legal acts, as well as on the official interpretation of the Constitution of Ukraine;

– preliminary consideration of other issues of the Supreme Court, the preparation of which requires scientific support.

As we see, the scientific findings of the above-mentioned Scientific Advisory Board can be applied in a wide range of law enforcement activities of the Supreme Court.

Thus, we can conclude that highly skilled lawyers working in the above mentioned scientific advisory boards actually perform the functions of legal experts in the cassation and constitutional courts.

Scientific conclusions may also be given after the corresponding request for their receipt. Examples of involving internal specialized bodies and organizations to assist the courts of the highest judicial institutions of Ukraine include the following. The Constitutional Court of Ukraine, often sending relevant inquiries to leading law schools and scientific institutions, receives conclusions that are usually in the form of a conclusion of a scientific and legal examination conducted in accordance with the Law of Ukraine «On Scientific and Scientific and Technical Expertise» [1].

As an example of taking into account scientific conclusions in law enforcement activities, one can refer the decision of the Constitutional Court of Ukraine of February 5, 2013 in the case of the constitutional appeals of the Limited Liability Company «Lichtner Beton Lviv» concerning the official interpretation of the provisions of the fourth paragraph of Article 58, part one of Article 64 of the Law of Ukraine «On business associations». In the above mentioned decision the positions of scientists of the Institute of Economic and Legal Studies of the National Academy of Sciences of Ukraine, the Research Institute of Private Law and Entrepreneurship of the National Academy of Legal Sciences of Ukraine, the Faculty of Law of the Taras Shevchenko National University of Kyiv, the National University «Law Academy of Ukraine named after Yaroslav Mudryi», the Faculty of Law of the State Higher Educational Institution «Vadym Hetman Kyiv National Economic University», Faculty of Law of Ternopil National Economic University.

A striking example of the scientific conclusion in the field of law is the scientific conclusion regarding the discretionary power of the subject of power and judicial control over its implementation, prepared on the instructions of the Chairman of the Court of Cassation Administrative Court in the Supreme Court M. Smokovych [2].

The above-mentioned conclusion examines the actual problems of judicial practice, which until now have no unified approach to their solution:

1. How to determine the limits of discretionary powers of the subject of authority?

2. How to determine the limits of judicial control over the implementation of discretionary powers by the subject of authority?

Mentions about the possibility of using scientific legal conclusions are contained in international law. Thus, the European Court of Human Rights indicates that in order to clarify the content of legal norms, it is necessary to take into account the results of doctrinal (scientific) interpretation. It should be noted that the ECHR in the Garnaga v. Ukraine decision referred to the scientific and practical commentary of the Family Code of Ukraine on the possibility of applying a similarity of law in the case of a person's desire to change his patronymic, although Ukrainian legislation did not provide for such a possibility.

Article 38 (1) (d) of the Statute of the International Court of Justice states that the court should apply the judgments and labor of the most skilled scientists as an additional means of determining the principle according to which the case should be resolved. The provisions of the International Commercial Court contain a provision that specifies the need to take into account the positions of specialists in the field of law when making decisions in court cases.

The literature raises the question of how the judge's inclusion of scientific findings is combined with the principle of "jus novit curia"?[3] In our opinion, the main purpose of the scientific conclusion in the field of law is to assist the judge in resolving the issues of the application of law, the resolution of which requires a systematic approach.

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STRELTSOV YE. L.

National University «Odesa Law Academy»,
Head of the Department of Criminal Law,
Corresponding Member of the National Academy of Legal Sciences of Ukraine,
Honored Science Worker of Ukraine, Academic Secretary of the
South Regional Center of the National Academy of Legal Sciences of Ukraine,
Doctor of Law, Doctor of Theology, Professor

KUZMIN E. E.

National University «Odesa Law Academy»,
Associate Professor at the Department of Criminal Law, PhD in Law

A SCIENTIFIC CONCLUSION: A METHODOLOGY FOR THE PREPARATION

The article is devoted to the study of issues concerning the methodology for the preparation of scientific conclusions. The characteristics of scientific and expert conclusions and advisory opinions are analyzed. The place of the conclusions for the judicial system is defined. The methodology of the criminal-legal research, including the compulsory components and the components of the procedural angle of the research are emphasized, as well, as the motivation of the research.

Key words: *scientific research, scientific conclusion, expert conclusion, advisory opinion, methodology of scientific research, methodology of scientific conclusion, methodology of the criminal-legal research.*

The complex and difficult processes that have been taking place at the global level, as well as in a certain region or in a particular state, regardless of their content and direction, and accompanying the rapid development of the society in recent years (Streltsov 2016, p. 42) have once again resulted into the necessity to rationalize the value of science, scientific research and findings in different spheres of knowledge, including the jurisprudence (Kuzmin 2016, pp. 1-2). Thus there is felt an increase in the demand for a large variety of scientific and expert conclusions and advisory opinions. Awareness of the recommendatory character of the latter, the pluralist spectrum of views and thoughts, issues of trust, respect and reputation of researchers, experts, academia and practitioners alongside with the quality and relevance of such conclusions and opinions, raises the question of the need for the methodology in their preparation.

In this regard, referring to the legal research, it is worth mentioning that a scientific conclusion needs to be undertaken in accordance with a sufficiently wide range of provisions that are inherent in legal science, in our case, in criminal legal study. Most notably, the conduct of a scientific research, in general, is considered as one of the types of productive human activity, the main purpose of which is to shape attitudes, ideas and assumptions about criminal-legal phenomena. Thus, in this situation, the definition of features of criminal law research is due to the presence of a fairly wide range of its functions (tasks).

It is fair to say that the preparation of a criminal-legal conclusion, which refers, generally speaking, to the generation of a new knowledge about the concrete phenomenon, is being viewed as one of the most common theoretical and applied type of scientific research in the field mentioned above. Meanwhile, the content of such conclusion certainly depends on the orientation and area of the relevant scientific conclusion.

Moreover, it should be noted that the preparation of such conclusions for the judicial system, based on the unified principles of the organization and operation of the courts, which exercise the judicial power, constitutes a separate area of focus. In turn, the preparation of such conclusions for the international courts (e.g. OON 1993) generally stands for the consideration to be recognized as a part of this pillar, but still remains separate in some way.

Significantly, the methodology, which is traditionally understood as the teaching about the organization of the relevant activities, techniques and methods of theoretical cognition, is considered as an essential part of the preparation of each and every single scientific conclusion. And if a method allows learning only one of the sides of the researched object, the methodology enables to experience the nature and scope of the whole phenomenon. Nevertheless, there are still active deliberations and debates on all of those issues (e.g. Hoecke 2011).

Hence, the methodology of the criminal-legal research should include several compulsory components, in particular: a) formulation of the problem, explanation of the object and the subject of the research; b) definition of goals and tasks of the research; c) designation of research methods; d) clarification and interpretation of the main categorical apparatus; e) preliminary systematic analysis of the research object; f) development of the research working hypotheses.

However, it should be noted that there is also a procedural angle of the research. As a rule, it usually consists of the following components: a) development of the principal research plan and its prospectus; b) identification of the main procedures for gathering and analysis of the raw data; c) approbation of the research results.

In addition, within the context of present-day realities, such criterion as a 'motivation' of the research should be given due regard in terms of the scientific conclusion both overall, and within the field of criminal law. It is necessary to mention that in the past this issue was raised by the European Court of Human Rights on several occasions. The Bönisch case (BÖNISCH v. AUSTRIA, [1985]) and the case of Brandstetter v. Austria (BRANDSTETTER v. AUSTRIA, [1991]) may serve as the vivid examples. In the proceedings neutrality, impartiality and objectivity of the experts were brought into question.

A. Einstein (1918, p. 225) in his '*Motives for Research (1918)*' stated that the final goal of the research has to be the obtaining of '… a simplified and intelligible picture of the world. …'. With respect to our specific case that means to conduct an objective, in-depth, unbiased, based on the methodology, research dedicated to the clarification of facts and eventually – to the ultimate truth.

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GOLUBIEVA N. Y.

National University «Odesa Law Academy»,
Head of the Department of Civil Procedure,
Doctor of Law, Professor

LEGAL EXPERT OPINION

Key words: *legal expert opinion, legal expert, expert, civil procedure*.

Scope of persons qualified to act as legal experts («experts in the field of law», regrettably there are inconsistencies in the terms used in the law, obviously they are the same) and their rights and responsibilities are specified in Art. 73 of the Ukrainian Code of Civil Procedure, listed among regulations on other parties to the civil procedure. According to Art. 73 of the Ukrainian Code of Civil Procedure, any person, who holds an academic degree and is recognized as an expert in the field of law, may act as a legal expert.

According to Art. 114 of the Ukrainian Code of Civil Procedure, parties to the case are entitled to file a legal expert opinion with the court. According to Art. 73 of the Ukrainian Code of Civil Procedure, the court shall make a decision on granting a legal expert the right to participate in the case and on entering the legal expert opinion into the case file. We shall assume that the rule on entering the expert's opinion into the case file shall also apply to the instance when the legal expert does not participate in the case personally, but his/her opinion is filed with the court by the party to the case under Art. 114 of the Ukrainian Code of Civil Procedure.

Such opinion is entered into the case file only based on a court ruling to that effect, whereas it does not matter whether such opinion was drawn up before or after commencement of an action.

Legal expert opinion is an outcome of research a) done by a special entity – recognized expert in the field of law, b) and covering a specific range of issues regarding application of an analogy of statute, analogy of law or content of rules of foreign law.

Purpose of the legal expert opinion is to assist in matters, which require special knowledge in the field of law. However, since judge is a person with relevant qualifications to hold such position and a person with legal knowledge (based on *jus novit curia* principle, meaning «*the court knows the law*»), legal expert opinion may, as a rule, apply to narrow-focus legal matters, expressly identified in the law: 1) application of an analogy of statute or analogy of law (the judge may at his/her own discretion or based on the legal expert opinion apply analogy of statute or analogy of law for settlement of matters in controversy); 2) content of the rules of foreign law in accordance with official or generally accepted interpretation thereof, practical application and doctrine in the relevant foreign state. Unlike the previous paragraph, in this case we deal with the foreign law, rules of which a Ukrainian judge is not obliged to know.

There are no special requirements to verification of the legal expert's knowledge of the rules of certain foreign law.

List of matters, regarding which a legal expert opinion may be issued, is exhaustive. That is why the legal expert opinion may not address application of any legal standard or factual circumstances of the case. If the opinion filed addresses other matters not specified herein, for instance, if the opinion addresses matters governed by the laws currently in force, fees for execution thereof may not be reimbursed as a part of legal costs.

Legal expert is not deemed an expert in the meaning of Art. 72 of this Code. Legal expert opinion is not a type of expert opinion. Subject of the expert opinion may be study of circumstances included into the facts to be proven, establishment of which requires the expert having special knowledge. Matters of law may not be a subject of the expert opinion (see Art. 102 of the Ukrainian Code of Civil Procedure), whereas a legal expert prepares an opinion on matters of law (range of which is specified in Art. 115 of the Ukrainian Code of Civil Procedure). Expert opinion is evidence in the case, on the basis of which the court establishes certain circumstances, whereas a legal expert opinion is not evidence. Art. 72 of the Ukrainian Code of Civil Procedure stipulates that an expert shall provide a substantiated and unbiased opinion in writing on the given matters. Art. 73 does not expressly stipulate such obligation with regard to a legal expert.

Legal expert is not notified of his/her responsibility for making a patently false opinion or for refusal without good cause to perform duties undertaken (though there are some instances of incorrect interpretation of the rules of foreign law in judicial practice, see Judgment of the Supreme Commercial Court of Ukraine dated March 6, 2017 in the case No. 907/930/15). On the other hand, in case of interpretation of the rules of foreign law, which, as we have noted above, a Ukrainian judge is not obliged to know, the judge relies on professional knowledge of a legal expert, so the law should have stipulated responsibility of the latter for making a patently false opinion.

Art. 72 of the Ukrainian Code of Civil Procedure expressly states that an expert may be appointed by the court or called for by a party to a case, whereas Art. 73 of the Ukrainian Code of Civil Procedure merely states that “a legal expert may be called for”. In view of the fact that above article deals with the right of the party to the case to file a legal expert opinion with the court, it seems that for such legal expert to be called for nothing but initiative of the party to the case, and not the court’s decision, is required.

Art. 38 of the Ukrainian Code of Civil Procedure does not mention a legal expert in the list of persons, with regard to whom a motion for disqualification may be filed. On the other hand, a legal expert opinion is of advisory nature.

Activities of the legal expert are not governed by the law in terms of standards and principles of such activities or methods to be applied. There are no requirements as to licensing, certification, employment, length of service, etc. The only objective condition for designating such a person as a legal expert is an academic degree, and the subjective requirement is recognition of such person as a legal expert (see Art. 73 of the Ukrainian Code of Civil Procedure).

Purpose of the legal expert opinion is not to establish or to examine circumstances that are a basis for claims and objections of the parties, unlike an expert opinion. Purpose of the legal expert opinion is to assist in matters of application of an analogy of statute, analogy of law or content of rules of foreign law, and it deals only with matters of law.

Scholarly opinions on application of the standards of law are prepared by Members of the Academic Advisory Board of the Supreme Court (Regulations on the Academic Advisory Board of the Supreme Court dated February 2, 2018, approved by the Decree of the Plenum of the Supreme Court). Their opinions should not be confused with opinions that are a subject matter of this article. Academic Advisory Board is an advisory body established at the Supreme Court under Art. 47 of the Law of Ukraine «Court System and Status of Judges» for preparation of scholarly opinions on activities of the Supreme Court that require academic support. Members of the Academic Advisory Board perform their duties on a gratuitous basis. Scholarly opinions are provided not at the initiative of the parties, but at the initiative of the Supreme Court.

Legal expert cannot make judgements on circumstances of the case or make opinions on the merits of the dispute, since credibility of such an opinion won’t be high due to the manner of obtaining the same. The legal expert shall interpret standards of law based on the legal doctrine and case law with maximum level of impartiality.

According to Art. 115 of the Ukrainian Code of Civil Procedure, legal expert opinion is not deemed as evidence, has ancillary (advisory) nature and is not binding upon the court. Though this article is in the chapter dedicated to evidence and proving, a legal expert opinion is not evidence. Such opinion is deemed as an advisory document, which questions overall feasibility of existence thereof.

The court is not obliged to enter the legal expert opinion into the case file, and even if it does, it shall not be binding upon the court. If the judge makes conclusions similar to those specified in the legal expert opinion, the court still has to make independent conclusions on relevant matters. At the same time the court may rely upon the legal expert opinion, but only to the extent of certain information specified by the legal expert, and not upon the outcome of the research.

When considering the legal expert opinion the court may disregard it without giving any reason, is not obliged to explain the reason for refusal to accept conclusions in question, unlike in the case of an expert opinion, rationale for overruling which by the court must be specified in the court judgment (Art. 110 of the Ukrainian Code of Civil Procedure).

Unlike an expert analyzing objective circumstances, a legal expert makes conclusions on the rules of foreign law, which may have various interpretations depending on application thereof in terms of time and scope of persons, and may also be interpreted in many ways in academic sources and case law.

Since the legal expert is entitled to consideration for his/her services to be paid by the customer, and there is no responsibility stipulated for making patently false opinions, opinions of such legal expert may be biased, and this fact shall be considered by the court when deciding on whether the legal expert opinion may be relied upon.

HRYSHCHUK O. V.

Ivan Franko National University of Lviv,
Professor of the Department of Law Theory and Philosophy,
Doctor of Law, Professor

CONSTITUTIONAL VALUES: INDIVIDUAL ASPECTS OF JUDICIAL INTERPRETATION

Key words: *constitutional values, interpretation, judicial interpretation.*

In order to reveal the meaning of the concept of “constitutional values”, it seems necessary to draft off the content of the two components of it, namely: “constitutional” and “values”. Expanding the content of these two concepts, one can come to an understanding of the essence and content of the concept of “constitutional values”, which covers the features and qualities of its constituents, offers us a new meaning with a qualitatively transformed meaning. Applying the so-called “elemental approach”, that is structuring the concept into component parts, a deeper understanding of it is theoretically possible. However, one should remember that the concept of “constitutional values" reflects a large part of the legal reality, which is endowed with unique features, qualities and content, and is a certain integrity, which has an independent significance. Therefore, the use of elemental approach is explained by the specifics of philosophical and legal reflection on constitutional values.

It should begin with the analysis of the adjective "constitutional" and determine whether it is equivalent to the fact that the parliament, which "establishes a constitution, literally writes these values in the text of the constitutional document ... Such use of the word "constitutional" implies the idea that the written constitution can give any meaning to constitutional values" [4].

Obviously this analysis lies in the plane of the ratio of natural and positive law. If we move away from the positivist point of view, then the above-mentioned understanding of the essence of the constitutional is true. That is, the constitutional is established by the legislator in the constitution. If we look at the problem from the natural law point of view, then the constitutions are provisions that correspond to unwritten constitutional norms and principles (natural law, the principle of justice and reasonableness, etc.), which are not enshrined in the constitutional text, but are organically associated with it, as well as constitutional values and legitimate aims of constitutional and legal regulation in society" [19].

Today, this idea is a prevailing methodological foundation for the study of constitutionalism as a whole, which is construed as a legal limitation of the state and opposed to arbitrary rule [3]. It is proven that the concept of constitutionalism forms the expression of the structural laws of social ties "built on the ideas of the association of law as a neutral tool for the needs and interests of individuals, communities or social institutions" [17]. As a philosophical and legal category, "constitutionalism is the embodiment of civilization values that are realized through the intercession of a democratic state and its institutions" [9].

In this context, it is appropriate to consider T. Paine that "the constitution is not a document of the government, but a document of people who are members of the government. And the government without a constitution is power without the right to it" [15]. That is, we can conclude that in a legal state, public power must be legitimate, that is, recognized by the people. The basis for the legitimization of power is a constitution, "which is at the same time a fundamental act in which the effective mechanism of legitimizing power is laid down and an act which itself is the result of democratic legitimation. The history of European constitutionalism is a vivid testimony to the fact that the constitution is, first and foremost, an act of the constituent power of the people, which is the primary to the authorities established, to which the legislature also belongs among others" [11].

Thus, legitimacy as a property of a constitution implies its recognition by society in terms of content and procedure. In terms of content, the constitution must comply with the natural law and reflect the will of the people, which is the source of the constituent power. "Legitimacy of the basic law is also ensured by observance of the procedure provided for by the same for change or such a procedure for the adoption of a new constitution that guarantees the implementation of the constituent power of the people (procedural element). Ultimately, the combination of content and procedural elements is intended to ensure the unconditional recognition of the constitution by society, on which its authority and readiness of society to implement its principles and regulations are based" [9].

It follows from the above that the restriction of the subject of constitutional law only by the norms of constitutional law is a myth and does not correspond to the practice of modern states in the process of constitutional justice. As US Supreme Court Chief Justice D. Marshall pointed out, "If the goal is legitimate, if it lies within the scope of the Constitution, and all means to achieve this goal are permissible, apply to it and are not forbidden, but correspond to the spirit and letter of the Constitution, then they are constitutional" [19].

Though the natural law approach to understanding "constitutional" is quite obvious today, there is no unity in the list of values that can be called "constitutional". This is due to the fact that each constitution can emphasize these or those aspects among existing values that can be recognized as "constitutional" and which may differ from one nation to another. In addition, the constitutional provisions are interpreted in accordance with the dominant idea of time, so that "the basic rights and requirements of the democratic process mean, even within one constitution, something else from time to time … Without a system of constitutional values, constitutional practice would risk to promote one specific value in a biased way and twist them into something completely opposite, legitimize injustice on behalf of the constitutional law" [4].

With an axiological approach to it, the Constitution is not created, but because of its inseparability with the spirit and values of the people arises from it and is proclaimed by the state. The more this truth is realized in practice, the stronger the constitutional order in terms of legal consciousness, the more intact the Constitution and its guidelines [13]. It is the constitutional values that determine the content of the constitutional principles and norms, the interpretation of which is entrusted to the Constitutional Court of Ukraine. They are interrelated with the settings and doctrinal guidelines when interpreting the constitutional text in a particular historical context [16].

It seems reasonable to consider the Constitution as a tool of value-filling the legal system of the state, the constitutional axiology of legal theory and practice. The value of the Constitution manifests itself in the fact that it is a unique document, which expresses the system of values and the program of life of society, a state that possesses the qualities of universality and compulsion. The Constitution enshrines and guarantees general legal values and values that are fundamental to society, the state, the people, and every person [18], namely: a human being, its life and health, honour and dignity, inviolability and security (Articles 3, 27, 49 of the Constitution of Ukraine); human dignity and freedom (Articles 21, 28 of the Constitution of Ukraine); the right to free development of an individual (Articles 23, 34, 35, 53 of the Constitution of Ukraine); legal equality (Articles 21, 24 of the Constitution of Ukraine); the rule of law (Articles 1, 8 of the Constitution of Ukraine); democracy (Articles 1, 5 of the Constitution of Ukraine); sovereignty and territorial integrity of Ukraine (Articles 1, 2, 17 of the Constitution of Ukraine); the republican form of government (Article 5 of the Constitution of Ukraine), etc.

The constitution is a concept that is filled with axiological content. “The Constitution is not a text; it is the value system, values that live, reproduce, and direct a social life”. Guaranteeing the Constitution implies guaranteeing fundamental social values in the legal system. The peculiarity of social values is that they express the main obligatory signs of legal existence on the basis of social consent, and therefore they are not subjective or discretionary. In addition, social values cannot “be manifested in isolation, they are systematized at the constitutional level and act as complementary and interconnected” [8].

Constitutional values are seen as the benefits embodied in various legal forms (norms and principles, rights and freedoms, other norms of the most general nature), enshrined in the constitution and deduced from its content through official interpretation [10]. Constitutional values are also considered universal, which are provided by means of legal protection in accordance with the constitution and determine the content of its principles and norms [17].

Prof. Venter proposed a hierarchical system of constitutional values, among which human dignity was singled out as the core. Equality and freedom are recognized by the scientist as supportive values, and democracy and the rule of law are structural values that together create a system of constitutional values. The proposed hierarchical system of values reflects a certain structure of the legal form of government. The discovery of the content of these values is due to the establishment of general rules of interpretation. Thus, constitutional values contribute to a correct understanding of constitutional provisions [5].

The Federal Constitutional Court of Germany also emphasized that the constitution is not neutral in terms of values. In the section on fundamental rights, it establishes an objective hierarchy of values, in which more important meaning of fundamental rights finds expression. “This system of values, which focuses on a freely developing person and its dignity in a social community, should be extended to the main constitutional and legal decision in all areas of law; legislation, administration and justice receive impulses and guidance from it” [2].

The Federal Constitutional Court emphasized that the social order of free democracy can be defined as a system that, except for any despotism and arbitrariness, is a system of rules of the law-bound state based on the self-determination of the people by the will of the relevant majority and on freedom and equality. The court referred first and foremost to the basic principles of this order: respect for the human rights as interpreted in the Basic Law, in particular the right to life and free development of the individual, state sovereignty, division of the branches of power, the responsibility of the government, the legitimacy of the authorities, the independence of the courts, the principle of multiparty and equality of the chances for all political parties with the right guaranteed by the constitution to create and operate the opposition [14].

A vivid example is the hierarchical system of values of the Constitution of South Africa, on the basis of which the state is based. The system of constitutional values includes the value of human dignity as the core of the system, equality and freedom as supporting values, and democracy and the rule of law as structural values. In this way, the values that are properly identified as "constitutional" create the limits of a legitimate form of government. In addition, constitutional values create general rules for interpreting the Constitution and promote a correct understanding of constitutional provisions [4].

One should agree that, at first glance, a purely philosophical position on the hierarchy of constitutional values may acquire a significant practical resonance in the event of the competition of values, "it gives an appropriate orientation to the state, particular centres of society, public organizations, and other entities (including individuals) when solving value collisions: there is no such value for which a human being could be sacrificed" [12].

The foregoing makes it possible to draw a conclusion on the constitutional significance of human dignity, which has a central regulatory role. Human dignity as a constitutional value is a factor that unites human rights into a single whole. This ensures the normative unity of human rights. This normative unity is expressed in three ways: firstly, the value of human dignity serves as the normative basis for the constitutional rights set forth in the constitution; and secondly, it serves as an interpretative principle for determining the scope of constitutional rights, including the right to human dignity; thirdly, the importance of human dignity plays an important role in determining the proportionality of the statute that restricts the constitutional law [1].

Appeal to constitutional values and human dignity is seen in the decision of the Constitutional Court of Ukraine 5-p/2018 dated May 23, 2018, in which, reflecting the current trends in the development of law, it is indicated that human dignity must be interpreted as a right guaranteed by Article 28 of the Constitution of Ukraine, and as a constitutional value that fills the meaning of human existence, is the foundation for all other constitutional rights, the measure of the definition of their essence and the criterion of admissibility of possible restrictions of such rights. By this decision, the Constitutional Court emphasized the importance of the constitutional values and human dignity as the system-creating value, a source of human rights.

On this occasion, the experience of the Constitutional Tribunal of the Republic of Poland is interesting. For example, in one of the decisions, the Constitutional Tribunal pointed out that human dignity has a number of functions in a constitutional order: the connection between the Constitution (act of positive law) and the natural law order; a determinant of interpretation and application of the Constitution; a determinant of the system and the scope of human rights and freedoms; and the subjective right of a person with a separate legal content [6]. In another decision it was emphasized that the application of the Constitution should be "accompanied by care for the preservation of natural human dignity. Hence, dignity cannot be considered as a feature or set of rights granted by the state. It is primary in relation to the state, as a result of which both the legislator and the law enforcement bodies should respect the content contained in the concept of dignity which belongs to each person" [7]. Thus, the constitutional significance of human dignity is emphasized as the natural and legal basis of the constitutional system values around which the Constitution and the foundations of the legal structure of the state are built.

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VASYLKIV V. I.

National University «Odesa Law Academy»,
Post-Graduate Student of the Department of Civil Procedure

APPOINTMENT OF EXPERTISE IN THE PROTECTION OF THE CHARITY AND DOMESTIC PRACTICE OF AN INDIVIDUAL

Key words: *linguistic expertise, inaccurate information, negative information, appraisal judgment.*

The existence of communicative human needs remains an undeniable fact. The state of the development of information technology indicates the improvement of means of interaction of individuals, including through the exchange of information. The advent of the Internet, various Internet platforms, mobile applications has simplified and improved the processes of searching, exchanging and disseminating information and creating it. Earlier, existing information sources such as print media, leaving their original form also transformed into electronic, in the form of Internet publications. However, the quality state of modern information has deteriorated significantly, which is confirmed by a significant number of existing «fake» news, unverified translations and other types of defects in information. Unfortunately, the aforementioned disadvantages can be used to violate the right to respect for the honor and dignity of individuals, since the evolution of communication opportunities, expressing opinions, beliefs and views, together with it, contributed to the abuse of such rights and resulted in violations of the rights of others through the expression, dissemination of inaccurate information about a physical or legal person.

The right to respect for the dignity and honor of an individual, among others, in Article 270 of the Civil Code of Ukraine, applies to personal non-property rights. The lack of definition of the notions of «honor», «dignity» and «respect for honor and dignity» in the Civil Code of Ukraine is understandable, since these categories are primarily moral and ethical rather than legal, but at the same time, violations of such moral and ethical norms are legal consequences. However, these concepts, as well as the concept of «inaccurate information», «negative information», are embodied in The right to respect for the dignity and honor of an individual, among others, in Article 270 of the Civil Code of Ukraine, applies to personal non-property rights. The lack of definition of the notions of «honor», «dignity» and «respect for honor and dignity» in the Civil Code of Ukraine is understandable, since these categories are primarily moral and ethical rather than legal, but at the same time, violations of such moral and ethical norms are legal consequences. However, these concepts, as well as the concept of «inaccurate information», «negative information», have been embodied in the current Resolution of the Plenum of the Supreme Court of Ukraine dated February 27, 2009 «On judicial practice in cases concerning the protection of the dignity and honor of an individual, as well as the business reputation of a physical and legal person».

In the Resolution of the Plenum of the Supreme Court of Ukraine, the legal structure of the offense states that inaccurate information is such that it is not true or falsified (contains information about events or phenomena which did not exist or existed, but the details of which are incomplete or distorted) [1]. Article 277 (3) of the Civil Code of Ukraine provides for the presumption of unreliability of negative information, that is, negative information is considered to be inaccurate until the person who spread it does not prove the opposite[2]. However, by definition of «negative information» it is worth referring to the aforementioned Resolution of the Supreme Court of Ukraine of 27.02.2009. No. 1, according to which negative information is considered to be such as if it alleges violation of a person, in particular, the norms of the current legislation, the commission of any other actions (violation of the principles of morality, generally accepted rules of cohabitation, unethical behavior in personal, public or political life, etc.) and which, according to the plaintiff, violates his right to respect for dignity, honor, or business reputation.

When analyzing the decisions of the courts of first instance, it is worth noting that solving the issue related to the complexity of establishing the content of the concepts of «negative information» and «estimates judgments», possibly through linguistic expertise. In accordance with the provisions of the Instruction «On the appointment and conduct of forensic examinations and expert studies» approved by the Order of the Ministry of Justice of Ukraine No. 53/5 dated 08/10/1998. With the help of semantic and textual examination, the following questions are solved: the meaning of words, phrases, phrases; their objective content; as to whether the information in the text is positive or negative in relation to a particular natural or legal person; Is there a negative statement about a particular person, whether the statement is an actual statement or an appraisal judgment [3].

However, an expert-linguist or judge must determine the form in which the information is expressed (actual statement or estimation), some scholars have doubts that they are substantiated by the fact that at the legislative level the notion «evaluative judgments» is defined in Article 30 of the Law of Ukraine «On information according to which estimates of judgments, with the exception of defamation, contain statements that do not contain factual data, criticism, evaluation of actions, and statements that can't be construed as containing actual data, in particular in view of the nature of the use last one linguistic and stylistic means (use of hyperbole, allegory, satire). Estimated judgments are not subject to refutation and proof of their truth» [4]. That is, for such signs it is a matter of law, which the court determines independently.

At the same time, according to O. Rublya, the question of the proper subject of the definition of information as an appraisal or actual statement is controversial, in spite of the legislative definition of evaluative judgments, it is necessary to take into account also the use of language-stylistic means (the use of hyperbole, allegory, satire), but for such signs, this question is not only legal, therefore it requires separate knowledge [5].

An analysis of the jurisprudence suggests that the courts apply the practice of the European Court of Human Rights, since courts refer, for example, to the decision in Lingens v. Austria, in which the court distinguished between facts and appraisal judgments, and noted that the existence facts can be proved, and the truth of a critical statement can't be proved. The requirement to prove the truth of a critical statement is impossible to execute and violates freedom on its own point of view, which is a fundamental part of the right protected by art. 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms [6]. The courts also refer to the decision of the European Court of Human Rights in case Feldek v. Slovakia, dated July 12, 2001, where a similar position was held regarding the delimitation of judgmental judgments from factual evidence.

That is, in order to adequately protect their violated right to respect for honor, dignity, and business reputation, it is necessary to distinguish the distribution of inaccurate information from valuation judgments and to take into account the excessive language, since the same sentence can be interpreted by different people to be absolutely ambivalent. Of course, the plaintiff can, in advance of the filing of the claim, determine in what form information has been disseminated about him, and then apply to the court.

The issue of proper protection of the violated non-property rights of an individual is particularly important as they are in the sphere of ensuring the functioning of not only legal norms, but also moral ones. Despite the legislative settlement of the issue of protecting the right to respect for the honor and dignity of an individual from his violation by disseminating inaccurate information, in judicial practice, the results of linguistic examination are of great significance, taking into account the peculiarities of modern methods of creating information and the complexity of determining its forms.

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OSTROVSKA M. A.

Lawyers Association “Partners”,
Head, Deputy Chairman of the Committee of the National Association
of Advocates of Ukraine on Approximation of the Bar Association
of Ukraine to European Standards, Lawyer

INAPPROPRIATE USE OF THE EUROPEAN COURT OF HUMAN RIGHTS' CASE LAW IN UKRAINE'S LITIGATION

Key words: *European Court of Human Rights, litigation, human rights, inappropriate use.*

Ukrainian human rights activists, like Ukraine as a whole, are very proud of the ratified Convention for the Protection of Human Rights and Fundamental Freedoms [1], and the blessed opportunity to use the practice of the ECHR in order to strengthen the legal argument in litigation.

Historically, the practice of the European Court of Human Rights in Ukraine has been a way of completely ignoring and ridiculous rejection of the brand's fashion, when it is not wary of the conclusions of the ECHR on all legal issues in a row.

The irrelevant use of the decisions of the European Court of Human Rights has been interestingly spoken by two well-known lawyers of the ECHR Secretariat and the Supreme Court in a joint publication on a related topic [2]. According to the Head of the Department of the Execution of Decisions of the European Court of Human Rights of the Directorate General for Human Rights and Rule of Law of the Council of Europe Pavlo Pushkar and the Head of the Department of Analytical and Legal Work of the Supreme Court, Rasim Babanli: "It is sometimes inappropriate to apply the practice of the ECHR to the use of citations from decisions made by the Court in fundamentally different circumstances or which justify other legal conclusions reached by the Court. Often you can see the reference to the ECHR ruling without the context of the very norm of the Convention to be applied, or without the actual context of the decision. The arbitrary treatment of such quotations, which sometimes does not reflect the very legal position of the ECHR, enshrined in the case, often takes place without even being familiarized with the full text of the ECHR judgment. Such application of the practice of the ECHR can lead to the fact that a certain legal problem, albeit as it is solved in accordance with generally accepted standards of practice of the ECHR, does not in fact take into account the completely opposite situation".

I will add some practical examples of the inappropriate reference to the practice of the ECHR, one of which is reflected in the ruling of the Supreme Court dated February 12, 2019 in the case No. 159/451/16-к [5], and the other is often used by defenders in postponing the trial [3].

In this criminal case, the defenders of the convicted persons substantiated the mandatory existence of a written confirmation of the voluntary consent of the owner to review his possession. By the judgment of the European Court of Human Rights in the case of Kucher v. Slovakia dated July 17, 2007 [4].

According to the tradition of the updated Supreme Court, a thorough and profound analysis of the legal position was carried out, which resulted in the refutation of the arguments regarding the relevance of the findings of the ECHR in relation to the actual circumstances of the case.

Pursuant to paragraphs 34, 44 of the decision of the Supreme Court by the panel of judges of the First Chamber of the Court of Cassation Criminal Court, consisting of A.P. Bushchenko, S.S. Holubytskyi and I.V. Hryhorieva the following is set.

"The defense party in the cassation appeal and the objections to the prosecutor's request to refer the case to the Grand Chamber insist that written confirmation of consent to the review of housing or other possession of the person is mandatory. They refer, inter alia, to the conclusion of the ECHR in the judgment of the Kucher v. Slovakiia case dated July 17, 2007, apparently bearing in mind the following passage: "The risk of abuse of power and violation of human dignity is inherent in a situation such as this one, when ... the applicant at dawn at the door of his home faced numerous police special forces in masks. In the Court's view, safeguards should be in place to prevent abuse in such circumstances and to ensure the effective protection of the rights of individuals under article 8 of the Convention. Such safeguards could include the adoption of legislation that would restrict the use of special units in a situation where ordinary police measures cannot be considered safe and sufficient and, in addition, would provide procedural safeguards, for example, ensuring the presence of an independent person during an operation or obtaining a clear, written consent from the owner as a prerequisite for penetration into his home". The reference of the defense counsel to the ECHR's judgment in Kucher v. Slovakiia is irrelevant in the circumstances of the case. The Court notes that, in the context of the Kucher v. Slovakiia case, written consent was mentioned only as one of the possible ways of ensuring the right to inviolability of housing in a situation where a person is compelled to make a decision when faced with the doors of his home with numerous armed masked law enforcers. There is no doubt that this situation differs sharply from the situation when the person himself calls the law-enforcers to investigate the crime committed against her" [5].

In my opinion, the situation looks even more interesting with reference to other conclusions of the ECHR, with which we colleagues personally encounter in criminal cases, where we represent the interests of victims.

Over the last six months, the popularity of one of the decisions of the European Court of Human Rights, which on Ukrainian resources exists only in the translation of a press release and with a strange mischief interpretation, is gaining momentum.

This is the case of "Bartaia v. Georgia" [5]. With the help of the conclusions of the ECHR, set forth in it, With the help of the conclusions of the ECHR, set forth in it, Ukrainian attorneys' advocates substantiate their own non-appearance in the court session by the right to a fair trial under Art. 6 of the Convention. Ukrainian attorneys' advocates substantiate their own non-appearance in the court session by the right to a fair trial under Art. 6 of the Convention. But the dissatisfaction of the courts with the petition for the postponement and continuation of the proceedings consider an attack on the sanctity of justice. After all, according to information disseminated on the Internet and among colleagues-lawyers, the ECHR justified and named a valid reason for the absence of a lawyer in a court session through participation in another process. It is necessary to understand that when forming practice, the court relies on the specific circumstances of the case, the details of which are decisive. It would seem, in almost identical circumstances that the ECHR can make diametrically opposed decisions, and this is not the fad of the court, but the proper and just weighing of all the arguments. The ECHR's decision, adopted by Bartai, concerned the civil case of a typographer, where the court found that the Convention had violated the human rights and fundamental freedoms by means of a decision against the applicant in the absence of a lawyer. The circumstances of the case are quite special, because the court sentenced: (1) the decision of the correspondence; (2) in fact (3) in one trial (4) against the absent party without his lawyer (5), preventing the further possibility of challenging the decision as part-time, precisely because of the recognition of the disrespect for the non-appearance of the applicant and his representative.

As a rule, lawyers refer to this decision, even without having an arsenal of the same circumstances under which it was pronounced against Georgia. For example, in a well-known criminal case following the events of a shootout in the village of Kniazhychi, where during the special operation of law enforcement officers of the National Police units killed their own colleagues from the State Service of Guard, lawyers accused of delaying the commencement of the case use the decision “Bartai v. Georgia” [3]. However, the position of the ECHR is not worded in any way by the full legality and unconditional respect of the absence of a lawyer in one proceeding because of employment in another, as well as the advancement of the protection of one client to another. The European Court of Human Rights has noted the insufficient motivation of the national court in resolving a civil dispute with the applicant in vain without the latter's right to legal assistance and limiting the further appeal of such a decision as absenteeism due to the recognition of disrespectful reasons for the absence of a lawyer.

Moreover, the ECHR, among other things, concluded that such a non-transparent hint is to consider the actions of a lawyer to ignore the trial due to another meeting, which is unfair, which is why the client has every reason to appeal to a court against his representative. Consequently, the ECHR decision not only awarded the applicant compensation from the state, but also provided the legal basis for the recovery of damage from lawyers through unfair/negligent actions.

Thus, in accordance with paragraph 37 of the ECHR judgment, the Court notes that from the very beginning and throughout the proceedings, the applicant was duly represented by a lawyer of his own choosing. This lawyer was responsible, in particular, for the notification of the applicant about the relevant legal procedures and the nuances of his case. In the Court's opinion, since the failure to respond to the request for postponement of the case on January 22, 2004 could mean the silent rejection of the petition by the district court, the lawyer should have taken all necessary measures and advised the applicant on all possible legal strategies, including the legal steps that he was required to take in the absence of a representative during the scheduled hearing (see, with the corresponding changes, Hermi v. Italy [GC], No. 18114/02, § 79, ECHR 2006-XII) [5].

Therefore, defenders should be cautious with the widespread use of the European Court of Human Rights judgments in their own practice, because the vain and inadvertent reference may not only seem unprofessional, but also turn against the lawyers themselves because of the ignorance of the nuances of the case and the superficial familiarity with the Court's findings.

Again, quoting the lawyers of the ECHR and the Supreme Court of Ukraine in the article entitled “On the question of (non) relevant application of the European Court of Human Rights practice: practical advice”, I note that “in order to avoid relevant inadequate manifestations of the incorrect application of the practice of the ECHR as a source of law, it is appropriate to pay attention, in particular, to such. First, on the similarity of the actual circumstances of specific cases. In order to properly apply the legal position of the ECHR, it is imperative to investigate the facts in which the ECHR has been formulated. Of course, it may not be about absolutely identical "twin circumstances" or ideal similarities, but the relevant circumstances should have a fundamental similarity and have no fundamental differences and differences with the facts of a particular case" [2].

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SHYSHATSKA Y. O.

National University «Odesa Law Academy»,
Graduate Student of the Faculty of Public Prosecution and Investigation
(Criminal Justice)

ADMISSIBILITY OF ELECTRONIC EVIDENCE IN THE CONTEXT OF ECHR CASE LAW

Key words: *European Court of Human Rights, electronic evidence, evolution of evidence.*

The institute of evidence is justly regarded as the fundamental basis of court proceedings. The European Court of Human Rights (hereinafter – ECHR), using the traditions and peculiarities of the general continental law, seeks to adhere to the democratic principles of proceedings enshrined therein; these principles directly influence the organization of the Court's activities in terms of compliance with the criteria of a fair trial.

The ECHR reiterates that it does not serve as a new instance, whereas the main task of the national courts is to study and assess evidence to establish objective truth. At the same time, the European Court develops its own procedures by improving the standards of proving for the implementation of international justice.

Currently, the ECHR does not hold a specific position regarding the appropriateness and admissibility of electronic evidence. However, there are a number of circumstances that may assist in investigating the implementation of the mechanism for using the latter by Strasbourg Court. Firstly, in the case of Nachova and others v. Bulgaria, the court explained that it was not bound by any rules in assessing evidence and, therefore, it adheres to the position of free evolution of all evidence. Furthermore, in the judgment on this case, the ECHR emphasized that it is susceptible to any evidentiary difficulty faced by the parties [10].

The positions of Ukrainian legislators should also be considered in the aspect of «evolution of evidence». There was no definition of electronic evidence at the legislative level in Ukraine prior to 2017, which resulted in the qualification of sound and video records to material evidence, whereas electronic correspondence and electronic documents were qualified as written evidence. Controversial judicial practice additionally testifies to the fact. Thus, one of the decisions of the Higher Commercial Court states that electronic correspondence is inappropriate and inadmissible evidence (the ruling of January 17, 2017 in the case No. 924/473/16). In other cases, such correspondence was acknowledged to be valid and admissible evidence (ruling dated 10.3.2017 in case No 903/821/16) [5].

The solution of the problem issue concerning the implementation of the mechanism for the use of electronic evidence has been regulated by the Law of Ukraine No 3147-VIII of 10/03/2017. Henceforth, a new means of proving – electronic evidence [2] has been introduced at the level of the Economic Procedural, Civil Procedural Codes and the Code of Administrative Procedure.

Electronic evidence is, therefore, considered to be information in the electronic (digital) form that contains data regarding facts relevant to the case, particularly electronic documents (including text documents, graphic images, plans, photographs, video and audio recordings, etc.), the web-sites (pages), text, multimedia and voice messages, metadata, databases and other data in electronic form. Such data may be stored, for example, on portable devices (memory cards, mobile phones, etc.), servers, backup systems, and other places of electronic data storage (including the Internet) [3].

However, the informatization of social life objectively affects the peculiarities of the criminal proceedings. In particular, this applies to such an important category as the source of evidence. Under Article 84 of the CPC of Ukraine, evidence in criminal proceedings is factual data obtained in the manner prescribed by the Code. Current legislation recognizes witness testimony, material evidence, documents and expert opinions to be the procedural sources of evidence. Unfortunately, this list has failed to include such an independent source as electronic evidence. However, electronic evidence is mentioned in paragraph 1 part 2 of Article 99 CPC of Ukraine, which refers to materials of photography, sound recording, video recording and other media (including electronic) [1].

The introduction of electronic evidence in the criminal procedural law is a necessity caused by the practical need to recognize such objects as a source of evidence in criminal proceedings due to – it should be mentioned again – different judicial practices. Thus, according to the verdict of the Podilsky district court of Kyiv, the court, having examined the screenshots of the correspondence in the Viber between the witness and the defendant, found that this correspondence confirmed the agreement to provide unlawful benefits to the suspect. As a result, the latter was convicted under Article 368 of the Criminal Code of Ukraine, namely, «Adoption of a proposal, promise or obtaining an unlawful benefit by an official» [3]. At the same time, in another criminal proceeding, the detectives of the National Anti-Corruption Bureau of Ukraine needed information of Viber-correspondence from one of the board members of the Odesa Portside Plant. According to NABU's position, «this correspondence in Viber may indicate involvement in the transfer of funds and their subsequent conversion». The Bureau planned to use correspondence as evidence in a criminal proceeding. However, the court rejected this petition of the detectives [4].

The ECHR case law does not specifically use the term «electronic evidence». However, the case of Schenck v. Switzerland, specifically dealt with the refutation of the so-called electronic (digital) evidence. In the case in question, the applicant argued that the recording of his telephone conversations and use thereof as evidence violated Clause 1 of Article 6 of the Convention. He also insisted that the use of illegally obtained evidence was sufficient to make the trial unfair and that his conviction was based mainly on the tape record. In its judgment, the ECHR noted that the tape recording of the telephone conversations was not the sole evidence on which the sentence was based. The ECHR further concluded that the use of tape recordings did not deprive the applicant of a fair trial and, consequently, did not violate Article 6 § 1 of the Convention [7].

To date, it is solely in the context of administrative, economic and civil proceedings that the issue of appropriateness and admissibility of electronic evidence is highlighted at the international level. In support of this, the guidelines of the Committee of Ministers of the Council of Europe on electronic evidence in civil and administrative proceedings of January 30, 2019 should be considered. According to the guideline, electronic evidence means any evidence obtained from the data contained on any device, the operation of which depends on the software or data stored in or transmitted via a computer system or network.

The aforementioned guidelines consolidated the principles of using electronic evidence that are binding on all courts, including national ones. Therefore, in the process of implementation of international justice, the ECHR should presently take into account the following: the courts should not reject electronic evidence and should not deny their validity solely because they are collected and/or submitted electronically and deny the validity of electronic evidence solely because they lack an advanced, qualified or similarly secure electronic signature; the parties should be allowed to submit electronic evidence in their original electronic format without the need for a printout.

Moreover, the guidelines clarified the issue of appropriateness and admissibility of electronic evidence. Therefore, paragraph 10 of the Guidelines provides that electronic evidence must be collected in an appropriate and secure manner and transmitted to the courts using reliable services such as trust. According to paragraph 18, the courts may require the analysis of the electronic evidence in question by experts, especially where complex issues of proving arise or where manipulations with electronic evidence are anticipated. The courts must decide whether such persons have sufficient experience in this matter. As regards reliability, paragraph 19 points out that the courts must take into account all relevant factors relating to the source and authenticity of electronic evidence. Courts need to be aware of the value of trust services to establish the reliability of electronic evidence. Under paragraph 21, electronic data should be accepted as evidence, unless the authenticity of such data is challenged by one of the parties. Paragraph 22 specifies that where a government authority transfers electronic evidence independently of the parties, such evidence is final in relation to the content, unless otherwise proven. Courts must decide on the potential evidentiary value of electronic evidence in accordance with the national law, and the electronic evidence itself must be assessed in the same way as other types of evidence, in particular regarding their admissibility, authenticity, accuracy and integrity [9].

Thus, when deciding on the compatibility of evidence obtained illegally with Article 6 of the Convention, the Court will consider three main issues – the availability of procedural safeguards, the quality of the evidence per se and its importance for the conviction [6, p. 13].

Taking into account the above, it should be summarized that criminal procedural legislation of Ukraine does not contain the concept of electronic evidence either, although this does not become an obstacle to its use in proceedings – it is subject to general criteria of appropriateness and admissibility. Therefore, in this case, the ECHR can be guided by the general provisions on the use of electronic evidence. However, the doctrine of «inevitable discovery» should not be abused, its essence being that the impugned part of the evidence «would inevitably be revealed by lawful means». In the long run, the admission of illegally obtained evidence through the doctrine of «inevitable detection» strongly undermines the deterrent effect of the rule of inadmissibility of the evidence obtained illegally [8].

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SECTION 6.
HUMAN RIGHTS AND FUTURE LAW SCHOOL

YUDKIVSKA G. Y.

European Court of Human Rights,
Judge in respect of Ukraine

DOES RIGHT TO PRIVACY EXIST IN THE ERA OF TRANSPARENCY AND MASS SURVEILLANCE?

***Key words**: right to be forgotten, fair balance, transparency.*

As technology develops, and the online world takes over the real world, our increasing online presence is becoming a defining feature of XXI century, with new challenges frequently emerging.

New informational space brought us new full transparency that is changing, first of all, an institute of reputation, which for a long time was outside human rights discourse.Quite paradoxically new informational technologies brought us back to traditional communities where everyone was in the public eye of the community, but now – on a new technological level. For example, they gave rise to a new right – the «right to be forgotten».

The «right to be forgotten» was prominently recognised by the Court of Justice of the European Union in the famous *Google Spain* in which the Court held that individuals had right to ask search engines to remove links containing personal data about them if the information about the individual is «inadequate, irrelevant or no longer relevant». The case was brought by a Spanish man Mr Gonzalez, who was involved in insolvency proceedings relating to social security debts in the late 1990s. These proceedings were reported in a regional newspaper in Spain in 1998 and the article was later made available online. Mr Gonzalez asked Google Spain to remove links to the newspaper in its search results when his name was entered as a search term in the Google search engine, arguing that the insolvency proceedings were concluded and it was no longer of relevance.

The CJEU accepted that a 'fair balance' must be struck between the rights to data protection and privacy on the one hand and the interest of the general public in having access to the information on the other [1], the Court also held that "as a rule" the privacy and data protection rights should prevail [2]. This judgment contains no reference to the Strasbourg Court's case-law and apparently provides for a different balancing exercise.

For the ECtHR, the right to freedom of expression applies not only to the content of information, but also to the means of transmission or reception, since any restriction imposed on the means necessarily interferes with the right to receive and impart information [3]. Thus, for example, if certain online platforms are told not to show certain web pages on search results, this can amount to an interference with Article 10. Firstly, it can interfere with the publisher's ability to impart information and secondly it can interfere with the public's ability to receive information.The «right to be forgotten» might thus become a serious threat to free online speech in the coming years, unless a delicate balancing exercise is performed on a case by case basis to determine which right will be given greater weight.

The ECtHR's balancing exercise is well-known – in a number of cases, starting with the leading *Von Hannover* judgment, the Court has provided a list of factors to be taken into account:

(i) contribution to a debate of general interest;

(ii) how well-known is the person concerned and what is the subject of the report;

(iii) prior conduct of the person concerned;

(iv) method of obtaining the information and its veracity;

(v) content, form and consequences of the publication; and

(vi) severity of the sanction imposed [on the party claiming an interference with freedom of expression] [4], [5].

This balancing exercise is not easily reconcilable with the *Google Spain* judgment, according to which the rights to privacy and data protection «override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name». [1] It is also noteworthy that the CJEU referred to accessing information as an «interest» rather than as a fundamental right.

At the same time, according to the ECtHR's findings in its landmark judgment of *Magyar Helsinki Bizottság v. Hungary,*a right of access to information may arise in circumstances where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression [6].

It is clear that the ECtHR does not prioritise the "right to be forgotten" without due consideration of the potential wider impact on freedom of expression – as was already proved by several recent cases where the Court engaged with the issues raised by the «right to be forgotten2 [7].

While it is true that the Internet poses new risks to data protection and privacy, this does not justify any downgrading of the fundamental right to freedom of expression.

Another challenge posed by new technologies is the fear of Big Brother who is watching you according to George Orwell, or omnipotent state.

The trigger for the case of *Big Brother Watch and others v. the United Kingdom* [8], pending now before the Grand chamber of the ECtHR, was the disclosure by Edward Snowden of electronic surveillance programs used by the United States and the United Kingdom for mass interception of communications, as well as the exchange of intercepted communications and communications between the two states.

More broadly, such cases concern both the rights to privacy and of freedom of speech for Internet users and mobile communication. Again, internet has opened up the possibility of a dramatically shrinking sphere of personal privacy in which so many aspects of our lives become opened up to scrutiny and possible ongoing surveillance. When unrestricted, state observation can transform the achievements of civilization into a tool of unbelievable repression, and provide unprecedented opportunities to invade private life.

The concept of «reasonable expectation of privacy», widely used nowadays by the Strasbourg Court, is to be reconsidered. A person on the Internet might be said to have a more limited expectation of privacy, as was firstly recognised in the case of *Muscio v. Italy* [9] back in 2007. More recently, the concept was mentioned in the GC case of *Barbulescu v Romania* [10]. The case concerned the applicant's dismissal following the monitoring of his electronic communications, mainly through his Yahoo Messenger account, which the applicant was instructed to create for communicating with clients. It was found that he used the Internet for personal purposes during the working day, in violation of internal rules. The Court left open the question of whether the applicant had a reasonable expectation of privacy, notwithstanding the employer's clear instructions for abstaining from any personal activity in the workplace, because an «employer's instructions cannot reduce private social life in the workplace to zero».

In *Benedik v. Slovenia* [11], for the first time in order to address privacy issues the Court has gone into a study of the Internet Protocol and forms of IP addressing. In that case the applicant accessed the internet through a dynamic IP address (Unlike the static IP address, 'a dynamic IP address is assigned to a device by the Internet Service Provider temporarily, typically each time the device connects to the Internet, and therefore changes each time there is a new connection to the Internet). He had done so, as was established, for dissemination of child pornography, and police, without a court order, requested an Internet service provider to disclose data regarding a user to whom a dynamic (IP) address had been assigned at a particular time.The Court addressed the question of whether dynamic IP addresses fall within protection of Article 8 and gave a positive answer.

In *LópezRibalda and Others v. Spain* [12] the applicants complained of covert video surveillance of supermarket cashiers by employer who wanted to investigate economic losses. The employer installed surveillance cameras consisting of both visible, of which the applicants were given notice, and hidden cameras, of which they were not. The applicants were dismissed following video footage showing them stealing items.

The Court found that the covert video surveillance of an employee at his or her workplace must be considered, as such, as a considerable intrusion into his or her private life. It entails a recorded and reproducible documentation of a person's conduct at his or her workplace, which he or she, being obliged under the employment contract to perform the work in that place, cannot evade.

Since the legislation clearly established that every data collector had to inform the data subjects of the existence of a means of collecting and processing their personal data, aim and manner of covert video surveillance was clearly regulated and protected by law, therefore the applicants had a reasonable expectation of privacy.

So, our privacy and its reasonable expectations should be sufficiently protected by law.

Any surveillance by itself is not a violation of human rights and the right to privacy in particular, it has to have a legal basis and be proportionate to the legitimate aim pursued in order to comply with the Convention. In particular, it must be the "least intrusive tool among those which can achieve the desired result." Yet while individual monitoring programs may seem necessary to achieve this legitimate purpose when taken separately, when they are analysed alongside other data sets which collect information for the same purpose, this analysis can reveal a great deal more and constitute a much greater interference with individual rights.

The nature of surveillance has changed. Previously, we were dealing with individual surveillance as seen in cases like *Khan v. UK*, *Bykov v. Russia*, *Allen v. UK* etc. – and exclusively within the context of criminal proceedings and admissibility of evidence against individuals. Today there is a shift from targeted to a mass surveillance. Previously we dealt with a deliberate decision to conduct surveillance in relation to a particular person; by contrast, metadata is typically collected automatically.

The case of *Roman Zakharov v. Russia* [13] is an excellent example of what safeguards the ECtHR could demand of Governments under such circumstances: the following minimum requirements should be set out in law in order to avoid abuses of power:

– the nature of offences which may give rise to an interception order;

– a definition of the categories of people liable to have their communications intercepted;

– a limit on the duration of interception;

– the procedure to be followed for examining, using and storing the data obtained;

– the precautions to be taken when communicating the data to other parties;

– the circumstances in which intercepted data may or must be erased or destroyed

– the arrangements for supervising the implementation of secret surveillance measures,

– any notification mechanisms and the remedies provided for by national law

The issues raised by the *Big Brother Watch and Others* case are novel ones. This case will give the Grand Chamber a fresh opportunity to conduct a comprehensive review of the Court’s jurisprudence on the interception (both targeted and, of particular relevance, bulk interception) of communications and to refine the key principles for reconciling the use of surveillance measures and the protection of privacy.

Privacy protection is a crucial achievement in European political and legal culture, not least because it was formed against the backdrop of the horrors of the Nazi and communist regimes of the twentieth century. In the long run, privacy will stand as a fundamental right so long as it is defended and valued by society, and it will disappear only if society permits it. Today, we have a reasonable expectation that our privacy is protected even when we go online. Our fundamental right to control how we present ourselves to the outside world and our ability to live our lives without constant scrutiny – these must be seen as vital for both the individual and also for a healthy society as a whole.

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ARAKELIAN M. R.

National University «Odesa Law Academy»,
Vice-Rector for Educational Work, Professor at the Department
of International and European Law, Doctor of Law, Professor

EU CHARTER OF FUNDAMENTAL RIGHTS: POLITICAL AND LEGAL ASSESSMENT

In the article the EU Charter of Fundamental Rights has been considered and received legal and political assessment in the framework of the European integration processes. Furthermore, it has been proved that the Charter played an important role in the process of the elaboration of standards of the human rights protection and represents a constitutional heritage for the whole European Union.

Key words: *EU Charter of fundamental rights, negative rights, positive rights, European Union, constitutional process.*

Nowadays, we live in globalized world which has run through considerable changes since the breakup of the World War II. Many organizations and unions have emerged since the second half of the XX century, but the most prominent and successful among them remains European Union, which has paved the way to the creation of numerous integration arrangements within different continents. Despite the fact that from the inception the European Union was considered as purely economic body, soon it became clear that integration within certain fields provoke similar processes in the others. One of them was human rights protection, where the EU used a clear cut approach by adopting the European Charter of Fundamental rights (hereinafter – Charter), which was comprised of a broad range of civil, political and social rights.

By the end of the XX century many EU-strong supporters championed the idea of introducing EU Constitution and 'EU Bill of Rights' as its integral part. This sounded as a logical step in the integration processes in the light of US experience, where Bill of rights had been adopted alongside constitutional process [4, P. 167]. The Italian Professor G. Federico thinks that the Charter was meant to answer the long standing problem of the uncertain status of fundamental rights protection in the EU but it was also intended to lay the foundations for a more proper constitutional legal order with respect to the one provided for by the original treaties [5, P. 7]. He argues that the central idea is that a democracy is not complete without a sufficiently constitutionalized system of protection of fundamental rights. In addition it should be recalled that constitutions are themselves choices of people and as such hardly 'undemocratic' [5, P. 8]. Between 2000 – 2005 there were strong debates regarding the EU Constitution, but Europeans casted their votes against EU Constitution, so after Dutch and French referendums (, – зпт) the idea to introduce a EU Constitution was suspended.

Despite the negative outcome of the constitutional process, it was understood that EU needs its own set of rules which would establish certain unified standards of the human rights protection in the light of the perspective enlargement. Worth noting, that after the Soviet Union had collapsed, many European states which became independent immediately decided to strengthen their ties with EU by applying to it. Despite the fact that Charter was adopted in 2000, its legal status remained uncertain until the Treaty of Lisbon entered into force, and the Charter became integral part of the EU primary law according to Art. 6 (1) Treaty on the European Union [1].

The Charter contains what may be called as 'negative' rights (rights that call for the state abstention from acting in certain areas like, for example, freedom of expression) and 'positive' rights (rights that call for the state action in a given field like social security). Synergy between these set of rights boost the democratic development of the European Union. British Professor G. De Burca thinks that since the European Union was created, the european integration process entered a new and more determinedly political phase of integration that is still very much in evolution. Arguably, it has become ever more important to articulate and prioritise the fundamental rights and interests of citizens as a response to the ongoing process of economic and political integration [7, P. 18].

Tracing the interdependence between the protection of human rights between the Council of Europe and European Union, American Professor R. Arnold suggests that they are autonomous but interconnected. The European Convention for the human rights and fundamental freedoms being, a product of the Council of Europe` legal activity, is still recognised as a legal source for the European Union and European Court of Justice in particular.

Overall, The Charter being unique still is inspired by a whole range of European project systems, the Convention for the Protection of Human Rights and Fundamental Freedoms, the European Social Charter, and EU law itself [5, P. 3].

The Charter grants not only individual rights, but also political. Among them the most prominent are the opportunity to cast a vote during elections and run to the European Parliament office (Art. 39) or to stand in municipal elections (Art. 40). European people can also rely on diplomatic and consular protection from another member state (Art. 46). Furthermore, European citizens can rely upon and claim good governance (Art. 41).

The Charter applies when EU countries adopt or apply a national law implementing an EU directive or when their authorities apply an EU regulation directly. The Charter does not extend the scope of the EU to matters which are not included in its normal remit. Basically, it satisfies the subsidiarity test and does not extend the competence of the EU institution exercising the Charter.

To sum up, it is worth noting, that European Union Charter can be considered as a serious achievement of the European Union. Its adoption served a good deal in the strengthening coherence and rule of law in the European Union.

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YEZEROV A. A.

Supreme Court,
Judge of the Cassation Administrative Court,
PhD in Law, Associate Professor

«THE RIGHT TO BE FORGOTTEN»: THE PRACTICE OF THE ECHR AND UKRAINIAN REALITY. PROBLEMS AND PERSPECTIVES

Key words: *human rights, practice of the ECHR, «the right to be forgotten», European Union.*

The growth of the pace of globalization and the unceasing and irrepressible development of IT-technologies are conditioned by the need to expand the guarantees of information rights and their adaptation to the conditions of a real social context. In his time, the world-famous writer George Orwell, in his novel, Nineteen Eighty-Four (1984), said that «anyone who controls the past controls the future; and who controls the present, controls the past» [1, p. 44]. This thesis should not be reduced to absolute, since it was written in a different context and related to the historical memory of certain events, whereas information operations can not be totally uncontrolled. Anyone who wants to protect personal data should be given the opportunity to ask for their removal if such a request is justified by sound grounds.

In 2014, the admissibility of such an opinion, which has long been discussed in the family of European nations, was also recognized by the Court of Justice of the European Union in a lawsuit between, on the one hand, Google Spain SL («Google Spain») and Google Inc. on the other hand, Agencia Española de Protección de Datos (Spanish Data Protection Agency, AEPD) and Mr Kosteja Gonzalez regarding the decision of IAZD to support the complaint filed by Mr Kostege Gonzalez against these two companies, which was requested by Google Inc. Take steps to remove personal data related to Mr. Costa Gonzalez to prevent access to data in the future *(Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos, Mario Costeja González)* [2].

The Luxembourg Court stated that «the search engine operator is required to exclude from the list of results displayed after a search made on the basis of a person's name links to web pages published by third parties and containing information relating to that person, even if this name or information is not erased in advance or simultaneously from these web pages, and even, as the case may be, when its own publication on these pages is legal».

Instead, Ukrainian legislation and law enforcement practice do not explicitly recognize the «right to oblivion» among the list of rights protected by the state. However, the analysis of the current normative framework, makes it possible to argue that the legislator at this stage recognizes a slightly modified and limited model of the implementation of such a right.

In particular, Art. 8 of the Law «On Protection of Personal Data» guarantees the person the right:

– to submit a motivated request to the owner of personal data with a denial against the processing of his personal data;

– make a motivated request for the modification or destruction of their personal data by any of their owner and manager, if the data are processed illegally or are false;

– to file complaints about the processing of their personal data to the authorized person or court.

According to Part 2 of Art. 15 of this Law, personal data may be deleted or destroyed, in particular, in the event of legal action by a court to remove or destroy personal data.

That is, it is seen that the Ukrainian legislation guarantees only the right to request the removal of information containing the relevant data to the administrator.

This is also confirmed by the judicial practice of administrative courts. For example, in the case No. 1240/2453/18, the Administrative Court of Appeal stated that there is no evidence that criminal cases No. 0307013801, 0307902601 suspended at the stage of pre-trial investigation on the basis of rehabilitation, or in accordance with the verdicts issued by the court, the court agrees with the conclusion of the court of the first the authorities that the data of the Department of Information Technologies of the Ministry of Internal Affairs of Ukraine AAA No. 0368149 are true. The court also noted that the plaintiff prematurely appealed to the court, since such an appeal may be in the case of information about the closure of criminal proceedings or acquittal sentences, and only after the refusal to remove the controversial information from the database [3].

At the same time, the ECHR in § 97 of its judgment *ML and WW v. Germany* notes that «it is through search engines that information about applicants in the media can be easily found by users on the Internet. However, the initial interference with the applicants' exercise of their right to respect for their private life arose as a result of the decision of the media to publish this information and, in particular, to keep it on their websites, even without the intention of attracting public attention; search engine activity only intensified the scope of intervention. However, due to such an increasing influence on the dissemination of information and the nature of the activity underlying the publication of information about the person concerned, the responsibilities of the search engines for the person who is the information contributor may differ from the obligations of the entity that originally published the information. Consequently, balancing interests can lead to different results, depending on whether the removal request relates to the original information publisher whose activity normally serves as the basis for protecting the freedom of expression or the search engine and whose main interest is not the disclosure of primary information about this person, and, in particular, helping to identify any available information about that person and establish his/her profile» [4].

Although the ECtHR partially recognizes the broad discretion of States and regularly emphasizes the subsidiarity of the Convention's mechanism for the protection of human rights, the red line in the Court's case-law always addresses the question of the State's positive obligation to ensure minimum legal safeguards compatible with the Convention. States can always foresee a higher standard of protection of convention rights, but at the same time have an obligation to implement in the legislation and judicial practice a convention minimum human rights law in the light of the devotion to the common legal heritage envisaged by Art. 1 ECHR.

Therefore, in this aspect, the national legislation of Ukraine contains a lower standard of human rights protection than the corresponding legal provisions contained in the practice of the ECtHR, and therefore the relevant ECHR decisions should become empirical grounds for their direct application to such legal relationships, and they should be implemented in the legal field.

Conclusions. Due to the expansion of the list and scope of information rights in a globalized and digitalized world, Ukrainian legislation and jurisprudence require the implementation of the latest standards for the protection of information rights. In particular, the relevant legal regulation of "the right to be forgotten" by way of its direct legislative recognition and establishment of legal grounds and the procedure for its implementation.

1. Due to the need to distinguish between entities responsible for the dissemination of certain information relating to personal data of a person, it is important to consolidate the pre-trial procedure for resolving the conflict.

First of all, a person must be guaranteed the right to contact the administrator of such information in whose operational possession it is located, with a motivated request to remove such information. When considering such a request, it is necessary to ensure observance of procedural rights of the person, in particular, the right to be heard and to receive a motivated decision of the administrative body. In this context, the approval of the second reading of the Law «On Administrative Procedure», which is currently being considered by the Verkhovna Rada, will be of great importance. This will protect the right to oblivion in the event of objective and indisputable circumstances that give rise to the right to protection. For example, such a procedure may be applicable, as mentioned above, in the event of a cessation of a criminal or disciplinary proceeding against a certain person on grounds not confirming the fact of his onset or lack of evidence. In the case of refusal to remove personal information, a person must be guaranteed the right to sue in court to the administrator of such information about its immediate removal from the information databases of the correspondent of the information manager.

2. Another dimension of this problem is the need to ensure the right to claim information resources that disseminate personal information that, in the opinion of the person, should be protected by the «right to oblivion». Today, this person has no such right. So it is important to guarantee this opportunity by law.

3. Prior to the implementation of appropriate legislative initiatives, the mechanism for implementing such a standard through judicial practice

should be applied, first of all, by informing judges about the existence of the relevant practice of the ECHR, and the possibility of protecting this right in case of claiming similar claims. Such a Supreme Court can participate in the implementation of such a program within the framework of appropriate trainings, roundtables, discussion platforms, which should promote wide awareness among law enforcement subjects of the main trends in the protection of human rights to the attractiveness of the irreversible processes of digitalization and the development of the digital economy.

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KOKHANOVSKAYA E. V.

Taras Shevchenko National University of Kyiv,
Professor of the Department of Civil Law,
Professor at the Department of Civil Law, Corresponding Member
of the National Academy of Legal Sciences of Ukraine,
Doctor of Law, Full Professor

PROTECTION OF NATURAL PERSON RIGHTS IN THE INFORMATION FIELD OF A CIVIL SOCIETY

Key words: *protection of rights, civil-legal remedies, information, information rights of individuals, Safety.*

The experience of some leading countries of the world proves that the informational and legal basis of civil society should be formed providing strict fulfilment of specific rules by all entities and participants of informational processes, as well as applying necessary governmental restrictions thereon to ensure national safety.

The well-developed civil informational society is characterized by, first, the ability of both the society and the state operating to provide for public and personal interests of its members to establish conditions for free access to information resources for its citizens; second, the ability to protect national information resources and interests of each person, society and the state from negative effects, to ensure reliable and free operation and development of national informational infrastructure.

Thus, the challenges of creation of informational and legal basis of a civil society are closely related to the matters of protecting informational relations as a whole as well as tasks which have been named «informational safety» in subject-specific literature. Today, a great number of works is dedicated to the research of this matter both in Ukraine and around the world.

According to Article 17 of the Constitution of Ukraine, ensuring informational safety along with the protection of sovereignty and territorial integrity of Ukraine, as well as ensuring its economic safety, is one of the most important functions of the State [1].

Considering the general theoretical approaches to understanding the modern informational threats, we believe it is necessary to mention not only the protection of informational rights, but also the protection of informational relations as a whole, because not only rights but also parties to informational relations, the most important of which being the information as a non-property benefit, are subject to protection in the informational field.

In this sense, civil and legal means of protection of informational rights should be coordinated with the general legal understanding of informational safety. The very term of «informational safety» should be included in the Civil Code of Ukraine (hereinafter Civil Code) as «the right to safety of informational environment» or «the right to a safe informational environment» along with the notion of environmental safety.

This would also enable guaranteeing the protection of informational rights for all entities of informational civil relations, among which the most attention should be paid to protection of rights of natural persons, in our opinion.

Among the main and most commonly identified factors affecting the status of ensuring informational safety are the following: imperfection of national legislation for informational safety, in particular the absence of framework Law of Ukraine «On Informational Safety»; insufficient regulation of legal relations between the State, owners of informational resources, domains and Internet providers by the provisions of national legislation of Ukraine; low level of budgetary financing of measures to ensure informational safety; failure to adhere to the requirements of legislation currently in force in the field of information protection, and many others.

Meanwhile, providing for national safety in the informational field, establishment and maintenance of functional informational safety and information protection system at a decent level according to modern requirements and existing threats, encouragement of national manufacturers of information products and technologies, computerization means and information protection means should become a priority of the state informational policy.

In fact, the safety system should not prevent quantitative (evolutionary) and revolutionary (qualitative) changes where they have been objectively raised, but, instead, should facilitate coping with the obsolete forms of life without damaging the society and citizens. At that, as the authors have conclusively proved, disclosure of the notion of safety similarly to the notions of protection and protectability only narrows down its meaning.

Commonly, «to protect» means protecting or shielding someone or something. At least, that is the way this word is explained in encyclopaedias today. Yet, it is important to take into account both the statics and the dynamics of the social system when studying the content of the concept of safety.

In civil society, protection of informational legal relationships against threats in the field of information is viewed by the specialists in terms of legal basis of such protection. Great attention is paid to these matters around the world, that's why, despite the significant share of "publicity" in the methods of their resolution, we consider it necessary to also pay due attention to them, first, for the purpose of making the terminological base universal in the field of legal protection of informational relations; second, for the purpose of detecting private law elements in the workings of authors and determining their place in private law. In our opinion, establishing the contents of these research workings would allow to find more effective means of protection of informational rights and relations in civil law.

Among the options of establishing correlation of interests of an individual, society and the state, the following three types are customarily named: priority of interests – parity of interests – balance of interests. At that, we believe that the principle of balance of interests should be preferred to all others because it allows consideration of the interests of each entity in the specific historical and other conditions to the fullest extent possible. In the meantime, the mechanism of definition, altering and ensuring of such balance of interests of the main entities is practically absent, except for some developments in the field of civil and legal regulation.

Unfortunately, like many other states, Ukraine still considers an individual mainly as an object of its activity and only slightly – as a party to relations in the field of public and personal safety, an approach that could lead to negative consequences. We are certain that the positive role is mostly played by civil law which focuses on an individual by shifting traditional accents to a natural person – a real person as a subject of rights. The reasons of a different, negative attitude lie in the dominating status of the State (which is not always justified) in all the processes, and overstatement of public and legal interests in the matters concerning informational field. This has already caused a considerable nonacceptance of public safety bodies, namely state bodies. People don't feel safe and start looking for other ways to protect themselves, while viewing the system of public and state safety as a hostile power, inclining to revolutionary (and not evolutionary) methods to resolve the conflict.

Protection of rights and freedoms in the informational field of Ukraine is performed mostly with the application of provisions of the Constitution and the Civil Code of Ukraine. Thus, a great number of constitutional provisions in Ukraine evolve, first of all, through the provisions of the Civil Code of Ukraine and some other laws. In our opinion, the notion of personal safety requires legislative consolidation at the level of the Civil Code of Ukraine as a condition of security of a natural person, including security in the informational field. For the civil society this means guaranteeing the interests of an individual in the informational field; establishment of a democratic and social state; consolidation of democracy, building the informational civil society etc. It should not be forgotten as well that the interests of the society also lie in guaranteeing interests of an individual in the informational field, consolidation of democracy and a democratic and social state based on achieving and maintaining public concord and spiritual renewal of the country.

Interests of the State can be determined as the establishment of conditions for implementation of constitutional rights and freedoms of individuals and citizens in the field of obtaining information and using it to support political, economic and social stability etc. Thus, we can draw a conclusion that the public and legal understanding of safety can be viewed not only as a notion closely related to the problem of protecting informational rights in civil law, but also more widely, through the notion of civil and legal security and protection of informational relations in their widest sense.

A deeper research of this notion reveals a lot in common with the implementation and protection of informational rights and protection of informational relations in civil law. The list of threats detected by specialists to produce a general informational safety doctrine can serve to define problems in the field of protection of informational rights and relations in civil law.

To sum up the abovementioned, we should draw a series of additional conclusions to those already formulated during this writing, in conformity with its consecutive statements. First, the provisions of the Civil Code of Ukraine are effectively applied today to protect interests of an individual, a society and the State against «harmful, dangerous and negative information», whatever the legal and doctrinal understanding of these definitions is. This can be proved by Article 293 of the Civil Code of Ukraine «Right to a Healthy and Safe Environment» which can be considered as covering informational relations as well. Yet, a specific provision of «the right to safe informational environment» should be introduced and formulated at least in general in the Civil Code of Ukraine, which should also stipulate such right for every natural person. Second, it is common for Ukrainian legislation that virtually all the trends of protection of informational rights and relations are related to the provisions of the Civil Code of Ukraine which, along with the provisions of the Constitution of Ukraine, form the basis for the whole range of legislation on information. It is the Civil Code and civil legislation in general that provides wide and diverse range of measures to protect violated informational rights. Third, democratization and further development of civil society, market relations and civilization as a whole should cause a significant impact upon the choice of civil and legal means of protecting informational rights and relations. Besides, considering protection of informational relations as a significant component of informational safety, it is important to speak about protection of informational relations in particular, and not only about protection of informational rights, because both the objects and the subjects of these relations have to be protected and not only their rights. In its turn, protection of informational rights includes protection of rights to information as personal non-property rights of natural persons and legal entities, as well as protection of informational rights which consist of intellectual property rights, rights to public information, rights to classified information, rights in the field of informational systems use etc.

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CHANYSHEVA G. I.

National University «Odesa Law Academy»,
Dean of Social-Legal Faculty, Professor of the Department of Labour Law and Social Security Law, Corresponding Member of the National Academy of Legal Sciences of Ukraine, Doctor of Law, Professor

THE RIGHT TO A STRIKE AS A COLLECTIVE LABOR RIGHT

Key words: *Constitution of Ukraine, strike, Convention, European Court of Human Rights.*

According to the Article 44 of the Constitution of Ukraine, those who work are entitled to strike in order to protect their economic and social interests.

By the Constitution of Ukraine, international legal acts, ratified by Ukraine, the right to strike belongs to the basic labor rights of workers and their organizations and is recognized as one of the most important means by which they can protect their economic and social rights and interests and contribute to their realization.

The norms of national legislation, securing the right to strike, are contained in Section III of the Law of Ukraine «On the Resolution of Collective Labor Disputes (Conflicts)» of March 3, 1998. In accordance with part one of Art. 17 of the Law a strike is a temporary collective voluntary termination of work by employees (no-show at work (absence from work), non-fulfillment of their labor duties) of an enterprise, institution, organization (structural unit) with the aim of resolving a collective labor dispute (conflict).

Strike is used as a last resort (when all other possibilities have been exhausted) to resolve a collective labor dispute in connection with the refusal of the employer or his authorized person, employers' organizations, association of employers' organizations to satisfy the requirements of hired workers (employees) or their authorized body, trade unions, associations of trade unions or a body, authorized by them.

A strike can be initiated if conciliation procedures did not lead to the resolution of a collective labor dispute (conflict) or the employer or a person authorized by him, the organization of employers, the association of employer organizations avoids conciliation procedures or does not fulfill the agreement, reached in course of solving a collective labor dispute (conflict).

Article 44 of the Constitution of Ukraine, part one of Art. 18 of the Law of Ukraine "On the Procedure for Resolving Collective Labor Disputes (Conflicts)" stipulates that a strike may be conducted by employees only for the protection of their economic and social interests. The legislation of Ukraine, as well as international legal acts, do not provide for the possibility of announcement of strikes for political motives. The so-called "mixed" strikes are also illegal. One of the reasons for the recognition of strikes illegal according to Art. 22 of the Law are their requirements for changing the constitutional order, state borders and the administrative-territorial structure of Ukraine, as well as requirements that violate human rights. The said provision aims to protect the state interests and the rights and interests of other persons.

The right to strike is a collective labor right, which involves collective actions, taken by those who participate in the strike. The latter are united by collective interests, the content of which is the improvement of working conditions or meeting of collective requirements of professional nature, as well as the finding of solutions to issues regarding the formation and implementation of state social and economic policies, regulation of labor, social, economic relations, other problems that arise at the national, sectoral, territorial, local levels, and are directly related to employees (the exceptions are the strikes of solidarity, which are legal under the condition of the legality of the initial strike, supported by the strikers).

Whether or not to take part in a strike is decided voluntarily by every employee. The relevant provision of Art. 44 of the Constitution of Ukraine was reproduced in part five of Art. 19 of the Law of Ukraine «On the Procedure for Resolving Collective Labor Disputes (Conflicts)», according to which no one can be compelled to participate or not to participate in a strike. The persons who force employees to participate in a strike or prevent participation in a strike through violence or threat of violence, or through other illegal actions, punishable by law, are prosecuted in accordance with the law.

The right to strike is not universal. The Committee on the Freedom of Association of the Administrative Council of the ILO considers that it may be limited, or even prohibited, in the field of civil service, as if civil servants are considered the persons exercising power on behalf of the State or with regard to employees of services of vital importance in the exact sense of the term, i.e. services, the termination of provision of which may endanger the life, personal safety or health of the whole or a part of the population. With regard to civil servants, the recognition of the principle of freedom of association does not necessarily include the right to strike. Regarding the workers of services of vital importance, for determining the cases in which a strike may be prohibited, the criterion is the presence of an obvious or inevitable threat to the life of people, their personal safety or the health of the population as a whole or a part thereof.

According to part one of Art. 24 of the Law of Ukraine «On the Procedure for Resolving Collective Labor Disputes (Conflicts)» it is prohibited to strike in the event that the termination of work by employees creates a threat to the life and health of people, the environment or disrupts the prevention of natural disasters, accidents, catastrophes, epidemics and epizootics or the elimination of their consequences.

The said article also prohibits the strike of employees (other than technical and service personnel) of the prosecution service, courts, the Armed Forces of Ukraine, state authorities, security bodies and law enforcement authorities.

Provisions of Art. 24 of the Law are specified by other laws of Ukraine. For example, according to Art. 18 of the Law of Ukraine «On Transport" of November 10, 1994, the strike is prohibited in cases involving the carriage of passengers, service of continuously operating plants, and also when strike poses a threat to human life and health. According to part three of Art. 35 of the Law of Ukraine "On the Use of Nuclear Energy and Radiation Safety» of February 8, 1995, the personnel of nuclear facilities and facilities intended for the handling of radioactive waste have no right to strike. Article 13 of the Law of Ukraine "On the Electricity Market" of April 13, 2017 strikes at power plants are prohibited in cases where they can lead to the violation of the constancy of the United Energy System of Ukraine.

According to part five of Art. 10 of the Law of Ukraine «On Civil Service» of December 10, 2015, it is prohibited for a civil servant to organize and participate in a strike. According to part four of Art. 54 of the Law of Ukraine «On Judicial System and Status of Judges» of June 2, 2016 a judge cannot take part in political actions, rallies, strikes.

International legal acts oblige states to ensure the right to strike, provided that it is implemented in accordance with the laws of each country. This provision is directly enshrined in Art. 8 of the International Covenant on Economic, Social and Cultural Rights of December 16, 1966. Since the right to strike in the International Covenant has been considered as one of the elements of the right to freedom of association, then, like the latter, the use of this right is not subject to any restrictions, other than those provided for by law and necessary in a democratic society in the interests of state security or public order or for the protection of the rights and freedoms of others. Article 8 of the International Covenant on Economic, Social and Cultural Rights does not preclude the introduction of legal restrictions on the exercise of these rights for persons forming part of the armed forces, the police or the administration of the state.

In the first part of Art. 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950 it proclaimed the right of everyone to freedom of peaceful assembly and freedom of association with others, including the right to form and join trade unions for the protection of their interests. At the same time, the second part of the said article states that the exercise of these rights is not subject to any restrictions, except those established by law and necessary in a democratic society for the sake of national or public security, for the prevention of disturbances or crimes, for the protection of health or morals or for the protection of the rights and freedoms of others. This article does not prevent the introduction of legal restrictions on the exercise of these rights by persons belonging to the armed forces, police or administrative authorities of the state.

The European Court of Human Rights stated in the decision in the case Veniamin Tymoshenko and others v. Ukraine (application no. 48408/12, dated 2 October 2014) stated that such an interference would constitute a violation of Art. 11 of the Convention, if it was not "established by the law", did not pursue one or more legitimate goals and was not "necessary in a democratic society" to achieve these goals. The Court reiterates that the expression «prescribed by the law» in Art. 11 of the Convention requires not only that the measure complained of has a foundation in national legislation; it also relates to the quality of the law in question. The law should be accessible to interested parties and formulated with sufficient precision in order to enable them – if necessary by providing appropriate assistance – to provide for the extent to which they are reasonable, in appropriate circumstances, the consequences that may result in the corresponding action (see, for example, the Maestri v. Italy judgment). The Court noted that national courts justified the prohibition of the strike, against which the complaint had been received in this case, with the reference to Art. 18 of the Law of Ukraine «On Transport», Art. 24 of the Law of Ukraine «On the Order of the Settlement of Collective Labor Disputes (Conflicts)» and Art. 44 of the Constitution of Ukraine. Consequently, it follows that the interference was based on national legislation. The court sees no reason to doubt that the aforementioned provisions were available. Therefore, it remains to be established whether they were also sufficiently precise and predictable. The Court noted that the Constitution of Ukraine, which entered into force in 1996, establishes the right to strike as a way of protecting the economic and social interests of employees. Regarding the procedure for exercising this right or the grounds for the prohibition of a strike, these issues should be regulated by the legislation. Two applicable laws are the abovementioned Law of Ukraine «On the Procedure for Resolving Collective Labor Disputes (Conflicts)» and the Law of Ukraine «On Transport». The court notes that Art. 24 of the Law of Ukraine «On the Procedure for Resolving Collective Labor Disputes (Conflicts)» of 1998, which deals with labor disputes in all sectors, prohibits strikes in the following cases: «If the termination of work by workers poses a threat to the life and health of the people, the environment or disrupts the prevention of natural disasters, accidents, catastrophes, epidemics and epizootics or the elimination of their consequences». In this wording nothing indicates that this list is inexhaustible. At the same time, Art. 18 of the Law of Ukraine «On Transport» of 1994, which since its adoption has not been amended, and concerns only the transport sector, also refers to cases of strike prohibition. This provision is more restrictive – in addition to cases where a strike poses a threat to the life or health of people, its conduct is also prohibited in cases «related to the carriage of passengers, the maintenance of continuous operations». It is worth mentioning that although the Final Provisions of the Law of Ukraine «On the Procedure for the Resolution of Collective Labor Disputes (Conflicts)» stipulate that other laws and regulations shall apply only to the extent that they do not contradict this Law, and also that they must be brought into compliance with this Law, the Law of Ukraine «On Transport» nevertheless continues to be applied without changes (see, for comparison, the decision of April 11, 2013 in the case of Vyerentsov v. Ukraine). The situation remains unchanged even now, despite the fact that the aforementioned contradiction and the need to bring the Law of Ukraine «On Transport» in line with the Constitution of Ukraine and the Law of Ukraine «On the Procedure for the Resolution of Collective Labor Disputes (Conflicts)» has repeatedly been recognized. These considerations were sufficient in order to enable the Court to conclude that the interference with the applicants' rights under Art. 11 of the Convention was not based on sufficiently precise and foreseeable legislative acts and, accordingly, there was a violation of Art. 11 of the Convention.

AFANASIEVA M. V.

National University «Odesa Law Academy»,
Professor of the Department of Constitutional Law, Doctor of Law,
Associate Professor

THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE CASE STUDY METHOD IN LEGAL EDUCATION

The paper analyzes the necessity of reforming legal education in the direction of not only theoretical but also practical preparation of a student for the professional activity, taking into account the needs of the modern state and society. The case study method is regarded as the best interactive practice of forming practical skills of a future lawyer. It is noted that the practice of the European Court of Human Rights is a useful source for the formation of case studies, as it encourages the development of the identity based on European values, theoretical knowledge about human rights standards and critical thinking skills and arguments.

Key words: *case study method, critical thinking, human rights, practice of the European Court of Human Rights.*

The issue of reforming legal education has been on the agenda for over a year in Ukraine. Its greatest pitfall is the incompatibility of a graduate of the institution of higher education with the challenges and requirements of the legal existence of the state, society and human. A significant problem for all graduates, regardless of the level of their theoretical training, is the gap between knowledge and practice, lack of readiness to work in real conditions and misunderstanding of how a lawyer works. Graduates do not meet the needs of a professional legal labor market.

In 2018, an expert group on legal education of the Directorate for Human Rights, Access to Justice and Legal Awareness of the Ministry of Justice of Ukraine conducted an analytical study which resulted in the preparation of the Report "Knowledge and Skills of Graduates of Law Schools and Higher Education Institutions through the Prism of Compliance with Labor Market Needs". In the course of the research, the main shortcomings of the existing legal education system were revealed: 1) the inability of the graduates to apply the acquired theoretical knowledge in practice; 2) lack of practical skills and abilities; 3) graduates have problems with the understanding of professional values. As a result, about 40% of law firms assess the level of knowledge of graduates of higher education institutions in Ukraine as unsatisfactory.

The future employers suggest that a graduate of a law school or an institution of higher education should have, in particular, a sufficient amount of practical skills, analytical and critical thinking skills. Accordingly, higher education institutions should include in the curriculum disciplines that form practical skills, as well as use appropriate interactive teaching methods: simulation games, litigation, project methodology, case study method, etc.

The case study teaching method is a highly adaptable style of teaching that involves problem-based learning and promotes the development of analytical skills [2]. Use of case studies was also shown to improve students' ability to synthesize complex analytical questions about the real-world issues associated with a scientific topic [3] case studies promotes critical thinking, learning, and participation among students, especially in terms of the ability to view an issue from [4].

Case-based cases can be obtained from various types of materials, in particular, from the practice of the European Court of Human Rights.

It is worth recalling that the 2004 Recommendation Rec (2004) 4 of the Committee of Ministers of the Council of Europe to Member States on the role of the European Convention on Human Rights in university education and professional training [5] stresses the need, inter alia, for adequate university education and professional training concerning the Convention and the case-law of the Court at national level and the incorporation of such education and training as a component into the common core curriculum of law and, as appropriate, political and administrative science degrees. In addition, it is extremely important that the study of the Convention be fully included in the programs of law departments not only as a separate subject, but also "horizontally" in each legal discipline (criminal law, civil law, etc.) so that students, regardless of their specialization, are aware, when they graduate, of the implications of the Convention in their field.

Taking into account the experience gained by the Member States since the adoption of the Recommendation, the Committee of Ministers of the Council of Europe decided in 2015 to revise this Recommendation or complement the text by adding "best practices" in human rights education for professional lawyers [6].

The case study method serves as an excellent teaching approach to instilling proper values in future lawyers by studying the standards used in the practice of the European Court of Human Rights. The case study method helps to translate abstract theoretical knowledge about common human values as well as political and legal ideals into practical applications, transform conditional human rights violations that seem remote into more realistic ones that can touch upon everyone. Besides, the case study method encourages students to develop critical and analytical thinking skills, to formulate convincing legal arguments, and to express their opinions clearly and reasonably.

The application of this approach also requires from lecturers continuing professional self-improvement, raising the level of pedagogical skills and knowledge in the field of human rights, as well as closely following the latest practice of the European Court of Human Rights.

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BELOV D. M.

Uzhhorod National University,
Professor of the Department of Constitutional Law and Comparative Law,
Doctor of Law, Professor

CONSTITUTION AND STATE POLICY: THE ISSUE OF CORRELATION

Key words: *supreme bodies, Basic Law, political sphere, historical conditions.*

Today, one of the reasons for the constant tension in relations between the supreme bodies of state power in Ukraine is the imperfection of the Basic Law, the different interpretation of its norms, as well as the fundamental change of the state policy, especially after the 2004–2005 presidential elections.

The constitution has a mixed political and legal nature, as well as to a large extent all constitutional law. Constitutional relations that arise on the basis of its provisions can also be characterized as having a dual nature: political and legal at the same time. Powerful relations subject to constitutional regulation create prerequisites for the appearance of political issues in constitutional law and politicize it to a certain extent. The political and legal in the constitution are closely intertwined, as well as the implementation of constitutional provisions can have a legal and political dimension.

As A. Heywood has rightly pointed out, for the vast majority of democratic states, constitutions were traditionally perceived as "precise descriptions of the current system of government" [1]. Consequently, any constitution always carries a certain prognostic-axiological element, which allows foreseeing a further direction of the state development and, accordingly, state policy. It is important to note that the prognostic function of the Constitution is directly written by well-known domestic researcher Yu. Todyka [2]. However, we now mean not only one of the possible functions of the constitution but also the fact that at its level the values are laid down that the state is called to provide.

The authors of the monograph "Politics, Law and Power in the Context of Transformation Processes in Ukraine" characterize state policy as a "system of purposeful measures aimed at solving certain social problems, meeting public interests, ensuring the stability of the constitutional, economic, legal system of the country […] the specificity of which is that it is realized through the power structures that have the authority of the monopoly right of the state to lawful coercion" [3]. Indeed, the link between the state policy and the constitution is shown by not only the reference to such a concept as "constitutional system". From the outset, the authors of the above-mentioned study establish a clear correlation between the direction of state policy and the process of ensuring social stability and satisfaction of the public interest. It should be borne in mind: the main social interests are always connected with the system of rights and freedoms of citizens of the state, which are not only formally fixed in the Constitution but must also be secured by it as a legal act of the highest legal force, which has a sign of direct imperative action (Article 8 of the Constitution of Ukraine) [4].

The same can be said for a widely used in the modern Ukrainian science definition of the state policy by V. Tertychka. This author proposes to interpret the state policy in the following way: “relatively stable, organized, and purposeful activity/inactivity of state institutions, carried out by them directly or indirectly on a particular problem or a set of problems that affects the life of society” [3]. Moreover, justifying the appropriateness of this way of understanding the phenomenon of state policy, he notes that the definition of state policy implicitly implies that it is based on the law and must be legitimate. That is, state policy does not appear, so to speak, solely on its own accord and on their own will of those who are currently endowed with state power. On the contrary, in order that this direction of the state’s activity should be systematic and coherent, it is necessary from the very beginning to have a certain set of rules and principles that would indicate: a) the type of political regime; b) the way of organizing state power; c) the main political institutions, the presence of which ensures the normal development of the state mechanism; d) the basic values and tasks that must be implemented during state and social development.

These rules should be fixed at the legislative level so that there are no ambiguous political interpretations of the way, in which policy should be implemented and on what grounds [4]. The universal method of fixing these rules and regulations is the method of constitutional determination. By giving these rules and principles an imperative value, the state acts as the guarantor of the fact that all participants in social and political relations will adhere to them. At the same time, it itself, as a mechanism of institutionalized coercion, will act in accordance with certain standards. Therefore, it is quite natural that in all democratically-operated countries, programs for the realization of state policy are always developed and implemented in accordance with the constitution.

However, it is necessary to distinguish between the constitution as a legal act and the functions specific to it in the legal field and the constitution as a political document having a certain socio-political content that directly or indirectly affects the entire political system of the country [5].

Consequently, the relationship between the constitution and politics manifests itself in two main areas. First, in a broad sense, political relations are one of the most important constituent parts of constitutional regulation. Constitutional norms set legal boundaries for the political process. They consolidate the foundations of the political system of society, and not only. In modern constitutions, the foundations of the social and spiritual systems of society, which affects the expansion of the object of constitutional regulation at the turn of XX–XXI centuries, are increasingly reflected. As rightly V. Chyrkin notes, “constitutional law went beyond a largely formalized approach of the XVIII–XIX centuries and spread to the settlement of issues of the social system, the situation of one or another stratum, groups of the population (social, national, age, etc.), socio-economic rights” [6].

Secondly, the constitution itself embodies a certain policy of the state, the desire of the project developers to consolidate certain principles and political values. Even K. Marx argued that "all legal has in its essence a political nature" [7]. This thesis on the Basic Law, according to V. Luchyn, becomes of a special significance. The political orientation of the constitution is one of the most important qualities that determine its special role in the legal system, a special social role in society. However, the idea that a constitution is created by the state to achieve a certain political goal requires some adjustments [8].

From the standpoint of democratic constitutionalism and the theory of social contract, both the institutions of public authority and the electoral body participate in the act of constitution creation in one way or another. Therefore, official representatives of the state – only one of the subjects of the constitution creation. The constitution should integrate not only state goals of development but also the idea of society about the goals of social progress, to be an indicator of the needs of different social groups, the expression of their expectations and hopes [4].

In the history of Ukrainian constitutionalism, the Constitution has repeatedly acted as a tool of state policy, ruling circles or political forces that came to power. Thus, the First Soviet Constitution – the Constitution of the RSFSR of 1918 – consolidated the victory of the proletariat and the poorest peasantry after the October Revolution, and was actively used by the Bolsheviks as a means of political struggle against social strata and classes that did not share the ideals of socialist construction.

Interesting is the characteristic of the Constitution of the RSFSR of 1918, given by the well-known Soviet legal ideologist of the 20's P. Stuchka to the twelfth anniversary of the revolution of the state and law. He called it "the civil war constitution", which is largely justified since it openly supported class positions on the issue of the acquisition and implementation of basic civil and political rights and freedoms [9]. Later in the process of constitutional development of the Soviet state, constitutional right gradually cleared itself from the ability to act as a tool of class domination, acquiring the nature of a universal legal regulator [4].

In the mid-80's, political scientist I. Stepanov, reflecting on the relationship between the constitution and politics, expressed the view that politics and law should be represented in the constitution in an organically integral form, "balanced in a coherent unity" [10]. Of course, during the Soviet period, the study of the constitutional policy was limited by many party-ideological barriers. However, the search for an optimal combination of politics and law in the constitution, constitutional policy, and political law is an important and constantly restored process of democratic development.

On the one hand, the tradition of observing constitutional limitations by subjects of political activity and political relations should be developed. On the other hand, the constitutional law should not be disconnected from political issues, and constitutionalists should seek to see political aspects in the implementation of constitutional norms. The study of political issues in constitutional law can shed light on the motives for adopting the constitution as a whole or individual constitutional changes, it can serve as an explanation or justification for the constitutionally regulated actions of state bodies and officials. In general, political issues highlight the controversial and problem areas of constitutional and legal development, contribute to the formation of a constitutional paradigm within the legally established normative framework of relations of person, society, and state [11].

In the concept of a political constitution, a special vision of a political community is laid down, in which a coordinated interaction between citizens and authorities is ensured and a political agreement on rules of conduct in the political sphere is taking place. History gives a lot of examples of violent imposing of the constitution by the ruling party, the authoritarian head of state, the oligarchic or military regime. However, in the spirit of the democratic policy, a constitution as a political document cannot be a political pact, which reflects the search for public consent and compromise in resolving various political and social conflicts [4].

In the political sphere, functions of the constitution are inextricably linked with its nature. In many respects, its effectiveness in the field of politics depends on the nature of the constitution. After all, the nature of the constitution is its socio-political content. In the national political science, in the Soviet era, the class nature of the constitution and its content were distinguished. Under class nature, they understood the basic socio-political characteristics of the constitution. It finds its manifestation in its content, principles, properties, and functions, has a decisive influence on its form, defining its fundamental features. The content of the constitution is the specification of its class nature. Moreover, the content may vary within a specific nature under the influence of a number of objective and subjective factors. The constitution had a dual meaning – social and legal [12]. The point is that this approach was based on a formative theory, according to which the specifics of the nature of the constitution in different countries were tied to a certain socio-economic formation. Throughout the period of the development of Soviet constitutions, even in the late period, known as «developed socialism», dominated the class concept of the nature of the constitution, which was determined by the class (classes) it serves and which type of property it establishes [13].

In our opinion, the nature of the constitution derives from its socio-political content, so to speak, in a concentrated form. The legal content of the constitution is determined by the objects of constitutional regulation, in other words, what legal institutes, principles, and provisions are reflected in the text of the constitution and in this regard acquire the constitutional status. Given the differences in the legal and socio-political content of the constitution, it is necessary to identify the key elements of its nature, which have a political influence on the functioning of constitutional provisions.

These elements can be formulated in the form of theoretical postulates, the answers to which give a general idea of the nature of a specific constitution. These include:

1) the will of which political forces found a consolidation in constitutional provisions (whose political will was enshrined in the constitution?);

2) the interests of which social strata are reflected in the constitutional provisions and supported by them (whose interests are reflected and supported by the constitution?);

3) what is the degree of legitimacy of the constitution, which is largely determined by the terms of its project development and the procedure for its adoption (how the chosen procedure for the development and adoption of the constitution influenced the degree of its legitimacy?).

In specific historical conditions and the legal culture of an individual country, the answers to these questions may vary. In the constitutional history of one and the same country, different constitutions may have a different essence. Moreover, the essence of one and the same constitution can eventually be transformed and move away from the original idea of its creators. This is primarily related to the fact that the socio-political conditions of the constitution, the implementation of its provisions can change.

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KARAKASH I. I.

National University «Odesa Law Academy»,
Professor at the Department of Agrarian, Land and Environmental Law,
Doctor of Law

LEGAL GUARANTEES FOR THE IMPLEMENTATION OF ENVIRONMENTAL RIGHTS AND OBLIGATIONS BY CITIZENS

Key words: *environmental rights, ecological obligations, citizens.*

Means of ensuring the realization of environmental rights of citizens are contained in the guarantees provided for in the environmental legislation. According to Art. 10 of the Law of Ukraine "About the protection of the environment" of June 25, 1991, the environmental rights of citizens are provided by: holding large-scale state measures for maintenance, restoration and improvement of the state of the environment; the responsibility of central executive authorities, enterprises, institutions, organizations to carry out technical and other measures in order to prevent the harmful effects of economic and other activities on the environment, to fulfill environmental requirements in planning, placement of productive forces, construction and operation of economic objects; participation of public associations and citizens in environmental protection activities; implementation of state and public control over compliance with legislation on environmental protection; compensation in the established procedure for damage caused to the health and property of citizens as a result of violation of the legislation on the protection of the environment; inevitability of responsibility for violation of the legislation on environmental protection; creation and functioning of the network of the national ecological automated information-analytical system providing access to environmental information. Activities that impede the exercise of citizens' right to a safe environment and other environmental rights thereof shall be suspended in accordance with the procedure established by the current legislation of Ukraine.

The guarantees of providing the proper fulfillment of ecological obligations by citizens are stimulating means of material and economic, moral and ethical content, as well as the types and extent of legal liability for violation of the requirements of environmental legislation. The Art. 48 of the environmental law provides for a wide range of incentive measures, some of which may encourage citizens to properly fulfill their environmental responsibilities. These can include: providing privileges for taxation of enterprises, institutions, organizations and citizens in the event that they implement measures for the rational use of natural resources and environmental protection, in the transition to low-waste and resource-saving and energy saving technologies; organization of production and introduction of treatment equipment and equipment for utilization and disposal of waste; installation of devices for monitoring the state of the environment and sources of emissions and discharges of pollutants; implementation of other measures aimed at improving the environment protection; provision of concessional terms for short-term and long-term loans for the implementation of measures to provide the rational use of natural resources and protection of the natural environment; establishment of higher rates of depreciation of major production environmental funds; exemption from taxation of environmental protection funds; transfer of funds of environmental protection funds on contractual terms to enterprises, institutions, organizations and citizens for measures to provide the guaranteed reduction of emissions and discharges of pollutants and reduction of harmful physical, chemical and biological influences on the state of the environment, on the development of environmentally sound technologies and industries; providing the opportunity to receive natural resources on a pledge.

However, the state and its bodies, as well as legal and natural persons, are not sufficiently guaranteed to fulfill their obligations to citizens, in particular their legal responsibility for violating the environmental rights of citizens. First of all, it concerns the reimbursement of harm to the health and life of citizens. It is known that the establishment of the size of the damage caused in the environmental legislation is carried out according to approved rates and methods. Such taxis and methods are established for damage caused to land, water and forest resources, objects of the natural reserve fund, atmospheric air, plants of the plant and animal husbandry, and others like that. However, it does not have such methods for determining the amount of damage caused to health and living conditions by violations of environmental rights of citizens. The lack of a method for detecting the size of such damage complicates its reimbursement. At present, the establishment of the size of the harm caused to the health of citizens is possible on the basis of medical, environmental, forensic, medical, scientific and other types of expertise.

In today's society, guarantees of protection of environmental rights of a person and a citizen are of special importance. According to Part 2 of Art. 11 of the Law "About the protection of the environment", the violated rights of citizens in the field of environmental protection must be restored, and their protection is carried out in court according to the legislation of Ukraine. According to Art. 16 of the current Civil Code of Ukraine, each person has the right to apply to the court for the protection of his personal non-property or property rights and interests. The ways of protecting civil rights and interests may be: recognition of the right; recognition of the transaction invalid; termination of an action that violates the right; restoration of the situation that existed before the violation; compulsory execution of duty in kind; change of legal relationship; termination of the legal relationship; indemnification and other methods of indemnification; compensation for moral (non-property) damage; recognition of illegal decisions, actions or inactivity of the state authority, the authority of the Autonomous Republic of Crimea or a local self-government body, their officials and officers. The court can protect civil law or legal interest in another way, which is established by the contract or by law or court in cases determined by law. The judicial procedure for ensuring the protection of the rights of citizens is defined in civil procedural law. At the same time, these civilized means and civil remedies for the protection of rights in court are extended to protect environmental rights, taking into account the specifics of their content and peculiarities of implementation.

In cases stipulated by law, the protection of environmental rights of citizens is carried out in an administrative manner. This may happen when the environmental rights of citizens are resurrected by specially authorized state authorities in the field of environmental protection and use of natural resources, relevant councils and their executive bodies, local self-government bodies, etc. Part 2 of Art. 11 of the Law "About the protection of the environment", local councils, state authorities in the field of environmental protection and use of natural resources are obliged to provide comprehensive assistance to citizens in the implementation of environmental protection activities, to take into account their proposals for improving the state of the environment and rational use natural resources, involve citizens in the decision of issues of environmental protection and rational use of natural resources.

In some cases, the protection of environmental rights of citizens is carried out by public organizations. In particular, according to Art. 21 environmental law, public nature protection associations have the right: to initiate an all-Ukrainian and local referendum on issues related to environmental protection, use of natural resources and provision of environmental safety; To apply to the court for compensation for damage caused as a result of violation of the legislation on environmental protection, including the health of citizens and the property of public associations. Undoubtedly, the activities of public environmental organizations and their associations are carried out in accordance with the requirements of the current legislation and on the basis of their charters. Consequently, human rights protection functions for the protection of citizens' environmental rights, including on a healthy and high-quality environment, must be provided for in their charters.

In the statehood of society, the ecological rights of citizens correspond to the obligations of the state, and vice versa, the ecological duties of citizens correspond to the state's rights to provide the protection of the environment. Therefore, the recognition and legal consolidation of environmental rights and obligations of citizens, providing guarantees for their implementation and ensuring protection, is in the interests of individuals and the rule of law, and society as a whole. A socially responsible state, providing a wide range of environmental rights to its citizens, can count on the proper fulfillment of their environmental responsibilities. On this basis, active cooperation between the state and its citizens can be formed in order to provide the quality of the natural environment. The society itself is also interested in the active implementation of its environmental rights and obligations by both the state and citizens. Thus, a proper legal settlement of environmental rights and obligations in a modern state, along with other factors, opens up certain grounds for the formation of a civil society.

NEUGODNIKOV A. O.

National University «Odesa Law Academy»,
Dean of the Faculty of International Legal Relations, Associate Professor
at the Department of the Administrative Law, Doctor of Law

THE FORMATION OF THE HUMAN RIGHTS PROTECTION MECHANISM ON THE EU SUPRANATIONAL LEVEL: LEGAL AND POLITICAL ASSESSMENT

This paper stipulates the development of the human rigths protection on the EU level which is traced back to the 1950-s when European Communities emerged. It is argued that human rights protection system was a logical consequences of the development of the interstate integration in other fields which created proper prerequisites for the the increase in human righths protection.
Key words: *sui generis, human rights protection, primacy of the European Union Law, ECJ`s activism.*

During the last several centuries, the European Continent went through dramatic changes which changed the pace of its development. The industrial revolution which took place in the XIX century led to the fostering of cooperation between European states which resulted in the creation of the different economic arrangements such as free trade areas and customs union. But the expansionist policy of the European monarchies led to the World War I and to the total disruption of the interstate trade. Besides, states tried to erect as many new barriers as it was possible preventing the free flow of goods, services, and workers cross borders. Such situation lasted till the end of the World War II, after which all European states found themselves in the economic devastation. Furthermore, state institutions were fully delegitimized due to their collaboration with Nazi regime.

On May 5, 1949 there had been created the Council of Europe. Despite the broad scope of its goals, soon it became clear that the activities of this organisation wouldn`t go beyond human rights issues too far, because the Council of Europe lacked institutional capacity to adopt effectively. Even the preamble of its Statute contained such provisions as: '…an organisation which will bring European states into closer association' and …'closer unity of all like-minded countries' [10] which proved that signatory states foresaw this organisation as purely international rather supranational and wanted to concentrated on closer association and not on the creation of the unity. The major achievement of the Council of Europe is still considered to be the Convention for the Protection of Human Rights and Fundamental Freedoms, which was signed on November 4, 1950 [9].

The strong desire to recover boosted among peoples of Europe the sentiment towards the unification. But still, the size and scale of the integration remained open. It was understood that despite all benefits, almost all European states did not want to give up their sovereignty to the sake of the common goals. That's why, the idea to create an economic organization among European states prevailed over the plans for military and political integration.

That`s why on April 18, 1951 the Treaty Establishing Coal and Steel Community (henceforth – TCSC) was signed by France, Germany, France, Italy, Belgium, Luxembourg, Netherlands. In contrary to the Statute of Council of Europe, the preamble of the TCSC recognised that '…Europe can be built only through practical achievements which will first of all demonstrate real solidarity, and through the establishment of common bases for economic development…..the basis for a broader and deeper community among peoples along, divided by bloody conflicts; and to lay the foundations for institutions which will give direction to shared destiny henceforward …' [8].

So, representatives of member-states, consulted by French politician Jean Monnet, envisaged that strong economic foundation will cause a 'spill over effect' and soon economic integration will lead to political and military integration with the gradual increase in human rights protection. The main argument behind this idea was the fact that tense economic collaboration between states would eventually lead to similar processes in others. Furthermore, American Professor H. Mason considered the creation of the European Coal and Steel Community (henceforth – ECSC) as an 'only road of the survival of the Creco-Cristian civilisation' [15, P. 5].

Inspired by the success of the ECSC, J. Monnet offered the creation of the European Defence Community (henceforth – EDC) and the European Political Community (henceforth – EPC) which was supposed to be a general framework for both ECSC and EDC. Article 2 of the Draft Treaty treaty embodying the statute of the European community stipulates that one of the primary goals for the Community is the contribution towards the protection of human rights and fundamental freedoms. Besides, the Part 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms are supposed to be considered as an integral part of the Draft Treaty (Article 3). It is worth noting that Part 1 outlines rights and freedoms secured by Council of Europe. Furthermore, the Draft Treaty also provides for the 'human rights test' in order to secure that human rights are protected in the European State which was deemed to express the will to join EPC (Article 118) [7]. Unfortunately, due to the failure of the ratification of the European Defence Community, the Treaty embodying the statute of the European community was also suspended.

The failure to enact both treaties created a chaos and vacuum in pro-European political elites which was partially resolved by the signing by the creation of the European Economic Community [6] and European Atomic Energy Community [5] on the March 25, 1957. These treaties were silent about human rights issues and were focused on the construction of the common economic space .

From the inception of all three communities, their legal nature was a subject of the numerous debates. Depending on the legal views and approaches, western scholars considered them either the integral part of the national law or international law. The final line under this discussion was drawn by the Court, which outlined that: '…E.E.C. has created its own order which was integrated with the national order of the member-States the moment the Treaty came into force; as such, it is binding upon them. In fact, by creating a Community of unlimited duration, having its own institutions, its own personality and its own capacity in law, apart from having international standing and more particularly, real powers resulting from a limitation of competence or a transfer of powers from the States to the Community, the member-States, albeit within limited spheres, have restricted their sovereign rights and created a body of law applicable both to their nationals and to themselves…' [13]. So, basically the Community legal order was promoted as the one with *sui generis* nature. We totally share the opinion expressed by Swedish Professor A. Cuyvers that without these doctrines, the EU would never have been as successful and effective as it is [14, P. 161].

Throughout the next several decades, member states of the European Communities increased substantially increased the collaboration between them even despite the institutional deadlock. Gradually, except common market, the new form of integration were launched such as: European political cooperation and combating terrorism. All of them penetrated the field of human rights protection one way or another. That`s why member states came to the point when they had to interfere and push forward 'human rights question'. The other reason behind this, was that the constitutional courts tried to challenge principle of the primacy of the Community law (now Union law) over national laws due to the lack of the human rights protection. This was the case in *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, in which German Constitutional court challenged this principle on the ground of the insufficient level of human rights protection in the EU [12].

Historically, very important decision was handed down by the European Court of Justice (henceforth – ECJ) case *J. Nold, Kohlen- UND BaustoffGrosshandlung* , in which the Court recognised that the national human rights provisions and the European Convention have to be considered as the part of the EU legal legacy [11]. So, here we see that the ECJ`s activism was crucially important in terms of the future not only human rights protection, but generally – European Communities (now – European Union) legal order.

In 1993 the European Union was created as a three pillar system which united European communities and cooperation in the field of international and home affairs policy.

Prominent step in the development of the newly formed European Union was made in 2000, when the Charter of Fundamental Rights of the European Union (henceforth – Charter) was adopted which reflects EU`s attitude towards human rights protection. From the Lisbon treaty (which abolished three pillar system of the EU providing for a legal personality), Charter is considered to be an integral part of founding treaties (Art. 6 Treaty on the European Union). But its application can`t go beyond the EU competence (Art. 51. of the Charter) [1]. So, even in applying this Charter, principles of the subsidiarity and proportionality have to be observed.

In 2007 Council of Europe and European Union signed a Memorandum of Understanding which confirms the role of the Council of Europe as the benchmark for human rights, the rule of law and democracy in Europe, stipulates the need for coherence between the two Organisations' legal norms in the fields of human rights [2].

To sum up, it is worth to suggest that the strengthening of human rigths protection system was a logical development for the European Union from the point of its future and position in the world system.

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FEDOROV V. A.

National University «Odesa Law Academy»,
Head of the Administration of the President, PhD in Law, Associate Professor

THE INTERNAL STATE DEBT OF SOVEREIGN UKRAINE IN THE CONTEXT OF SOLVING ISSUES OF IMPLEMENTATION OF DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS

Key words: *implementation of decisions, internal state debt, European Court of human rights, human rights.*

Formation of internal and external public debt is an integral part of the functioning of the economies of most countries of the world, a powerful lever of macroeconomic regulation and an instrument for implementing economic strategy. Unfortunately, in Ukraine during the transformation processes of the formation of public debt was largely chaotic, under the influence of the needs of operational financing of current budget expenditures, reflected in its structure and volumes.

The issue of governance and regulation of public debt is extremely important, especially under the current conditions, when Ukraine, besides a significant budget deficit, also has a rather large public debt, as well as a large number of unfulfilled decisions of the European Court of Human Rights, which also accumulate debt.

The development of socio-economic relations in the state confirms the need to resolve the problem of financial optimization as a matter of urgency as the basis for nation-wide stabilization and exit from the economic crisis [1, 64].

The problems of conducting effective economic reforms and making significant investments in the Ukrainian economy are becoming increasingly relevant for the revival of the economic situation and the solution of financial problems in the state, it is expedient to use the funds.

The situational approach to the formation of the structure of public debt and the discreteness of borrowing lead to marginal payment overloads. Unfortunately, in Ukraine, during the transformation processes of the formation of the state debt was chaotic [2, 183].

In case of a decrease in the amount of funds from the state internal (external) borrowings in comparison with the amount determined by the law on the State Budget of Ukraine, due to the deterioration of such borrowing conditions and / or the financial market conditions, the amount of funds from the state external (internal) borrowings with the observance of the maximum amount of public debt.

In case of reduction (increase) in the volume of payments on repayment of the state debt in connection with the improvement (deterioration) of the conditions in the financial market in comparison with the amount determined by the law on the State Budget of Ukraine, the amount of state borrowings decreases (increasing) with observance of the state budget law Ukraine, the volume of financing of the state budget for debt operations.

Credits (loans) borrowed by the state from foreign states, banks and international financial organizations for the implementation of investment programs (projects) relate to government external borrowings [3]. In accordance with the concluded loan agreements, funds for the implementation of such investment programs (projects), as well as maintenance and repayment of the corresponding loans (loans) are provided for in the law on the State Budget of Ukraine during the whole term of the loan agreements. Such lending agreements do not require ratification, unless otherwise provided by law.

All investment projects and programs, and the funds received from them are realized in accordance with the concluded loan agreements between the foreign borrower and the state Ukraine [4].

State domestic borrowing is carried out by concluding agreements with residents of Ukraine on the loan and issue of government securities placed on the domestic market; the state external borrowing is carried out by concluding with the non-residents of Ukraine loan agreements and issuing government securities placed on the foreign market [5, 60].

A promising source of attraction of funds in Ukraine is the domestic market, since today it is characterized by considerable capacity, and borrowing on it is less burdensome than on the foreign market. In addition, the mobilization of financial resources through the implementation of domestic state borrowings is characterized by significantly less negative consequences for public finances compared to monetary balances of government revenues and expenditures [6].

The focus of government borrowing is focused on financing the state budget deficit, in particular financing of current expenditures, repayment of past debts and state-guaranteed loans to enterprises, investment projects, and only a small part in support of strategic sectors, in the real economy and in support of innovative projects, as well as funds to comply with decisions of the European Court of Human Rights.

The formation of Ukraine's public debt was caused by a number of subjective and objective factors. Among the objective reasons for the formation of a public debt, the transformational recession, caused by the processes of transition of the Ukrainian economy from the command-administrative system to the market, should be called; reduction of budget revenues due to the narrowing of the tax base; imbalance in trade balance; the prevalence of inefficient and energy-intensive technologies, etc. The effect of subjective factors can be explained by the presence of inconsistent and ineffective methods of managing public debt, which in the end can significantly affect its structure.

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BIHNIAK O. V.

National University «Odesa Law Academy»,
Acting Head of the Department of International and European Law,
Doctor of Law, Associate Professor

EUROPEAN COURT OF HUMAN RIGHTS AS AN INSTRUMENT FOR PROPERTY RIGHTS PROTECTION

Key words: *property rights protection, judgment, Convention for the Protection of Human Rights and Fundamental Freedoms.*

The issue of the property rights protection is regulated not only at the national level, but also at the international level, in particular, by the Convention for the Protection of Human Rights and Fundamental Freedoms.

Courts and unified judicial practice play an important role in ensuring the protection of property rights [6]. Consequently, the final nature of the ECHR judgments and the binding nature of their execution can be regarded as the most important condition for guaranteeing human rights and freedoms.

Therefore, in order to protect property rights effectively, it is necessary to familiarize with the practice of the European Court of Human Rights in order to highlight issues which need attention in the protection of this category of cases.

Thus, the Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms provides that every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties [1].

The ECHR in the judgment on the case of «Fedorenko v. Ukraine» defined the main criteria for determining compliance with the requirements of the Art. 1 of the First Protocol to the Convention, namely:

whether there was an interference with possessions;

whether the interference was lawful under the provisions of national law;

whether the interference pursued a goal aimed at satisfying the interests of the community;

whether the interference was justified. In other words, whether it was observed «fair balance» between the demands of the general interests of the community and the requirements of the individual's fundamental rights.

When considering the European Court of Human Rights cases that deal with the violation of the norms of the Art. 1 of the First Protocol, the Court proceeds from the analysis of the three parts of the norm in their entirety: 1) the principle of peaceful possession of property; 2) violation of such principle; 3) control over the enjoyment of the right to peaceful possession [7, p. 92].

Thus, the European Court of Human Rights in «Marckx v. Belgium» case interpreted the term «peaceful possession» as a protection of property right, in which the court stated: «By recognizing that everyone has the right to the peaceful enjoyment of his possessions, Article 1 is in substance guaranteeing the right of property» [2].

The violation of such «peaceful possession», which belongs to natural and legal persons, is, in essence, any interference with the ownership of the said persons. Precisely this interference can take the form of deprivation of the possibility of the right realization to use an object owned by the indicated persons, failure to provide for permits prescribed by legislation, other forms of interference with the realization of property rights [4, p. 20].

Considering applications on violation of the Article 1 of the First Protocol to the Convention, the Court hears cases not only on the interference with the possessions, which is connected with the formal deprivation of the right to possess property, but also cases where interference with the right to peaceful possession of property or deprivation of such a right occurred de facto. Thus, in the case of «Sporrong and Lonnroth v. Sweden» was discussed the formal restrictions of the right of ownership, which led to a violation of the Article 1 of the First Protocol. In this case, the European Court of Human Rights has made a conclusion stating that the judgement must be based not only on a formal approach but also on a comprehensive and complete study of the factual circumstances of the case that could indicate the actual deprivation of the person's property possession.

The Court recalls that interference with the peaceful enjoyment of possessions must strike a «fair balance» between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights [5]. Therefore, it is worth noting that it is necessary to insist on the need for a proportional relation between measures that are used and the goal sought to be achieved by depriving a person of his property right.

In deciding whether this requirement was met, the Court proceeds from the fact that the State has a wide discretion both as regards the choice of method measures and in determining whether justified consequences of such measures in view of the general interest to achieve the goal of a certain law.

The court must determine whether the required balance has been respected in a manner compatible with the right of a person to «peaceful possessions» in the sense of the first sentence of the Article 1 of the Protocol No. 1 (Judgment in case of «Zvolsky and Zvolska v. Czech Republic») [3].

Cases in which property rights violations are concerned should be verified by the ECHR to comply with the balance between the needs of the general public importance and the preservation of the individual's fundamental rights. First of all, relying on the fact that the person concerned should not bear a disproportionate and excessive burden.

Analyzing the European Court of Human Rights practice it is worth paying attention to the concept of «property», which is constantly expanding, as property within the meaning of the Convention and its Protocol – an independent phenomenon that in no way related to its interpretation at the national level. Thus, in addition to movable and immovable property, protected by the Art. 1 of the First Protocol, there are also under protection shares, patents, licenses, professional clientele («good name»), material compensation awarded by a court decision, the right to a pension, etc.

Summarizing the above, we can conclude that interference with property rights is possible only when it is based on the law, pursues a legitimate aim in the public interest and provides a balance between the latter and the private interests of the person whose rights are being interfered.

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KATSYN M. Y.

National University «Odesa Law Academy»,
Associate Professor at the Department of International and European Law,
Vice-Dean of the Faculty of International Legal Relations, PhD in Law

HUMAN RIGHTS ISSUE IN THE EUROPEAN POLITICS DURING THE FIRST HALF OF THE XX CENTURY: LEGAL ASSESSMENT

This article is devoted to the consideration of the human rights issue within the context of the European Politics of the first half of the XX century until the beginning of the XXII. The author argues that the dissolution of the empires and the creation of the newly independent states have put minor ethnic groups in week position and the League of Nations which was created in 1919, did not protect their rights sufficiently.
Key words: *human rights issue, European politics, League of Nations, dissolution of the empires, national sovereignty.*

Throughout the last several centuries, the European politics has been constantly evolved due to the intensification of the collaboration between European states which led to the creation of the different economic and political arrangements which had a conflict nature in the nutshell. This was due to the nature of the governing regimes, majority of which were authoritarian and this was the reason why personal ambitions of monarchs took priority over the core interests of their states and resulted in the WWI.

The World War I had had terrible economic and political consequences for further development in the whole of Europe, such as: demographic crisis, reduced production, very high unemployment, and a sharp drop in the level of personal incomes.

At the same time, WWI caused a process of disintegration of several European empires, which resulted in the emergence of twenty new states. The most prominent example of this process was Austro-Hungarian Empire. According to the Hungarian Professor O. Jaszi, the Austro-Hungarian state, in case if it was converted to the federation in advance, could have solved the most fundamental problem of that time Europe, which was latter the problem of the League of Nations – how it is possible to unite national individualities of very divergent ideals and traditions in such a way that each of them can continue its own particular life, while at the same time limiting its national sovereignty is enough to make a peaceful and effective international cooperation possible [5, P. 4].

The British scientist, S. Pollard, noticed that '….in contrast with the newly created nation-state of the nineteenth century, which enlarged the economic area and operated in the direction of expansion and progress, the newly created nation-state of the twentieth century became a fetter on efficiency and progress, and lent its power to the turning back of the wheels of history….' [6, P. 132].

The right to national self-determination propagated by Vladimir Lenin and later by W. Wilson at the end of the First World War solved old conflicts while engendering new ones. According to Provision 5 of Fourteen Points by the President Woodrow Wilson, peoples received right for the self-determination. Overall, Versailles peaceful process, had given sixty million people a state of their own, but it turned another twenty five million into minorities [2]. According to Article 22 of the Covenant which established League of Nations, signatories states undertook responsibility to 'the well-being and development of such peoples' [1].

Furthermore, after the First World War a completely new group of refugees emerged, stateless people, who as «foreign elements» or «the class enemies» had been stripped of their citizenship by one nation and forced to emigrate, but were unable to officially immigrate to the receiving nation (and apply for political asylum). This was particularly acute for Armenians and the millions of political refugees from the Russian Civil War (1917–1920) and beginning in 1933 a matter of life and death for German Jews. It was only with the dissolution of older multi ethnic empires and the reordering of the world into egoistic nation-states that ethnic homogenization and genocide emerged as political imperatives for bio-politics [4, P. 28].

It is well-known fact that the preparation of: economic, legal, and political projects, for the rapprochement of European states, took place at both civil and official levels. Suffice to say, that at civil level, a very important role was played by the Pan-European Union (PEU), which consisted of politicians, professionals, and other parties, who were interested in a unified Europe. The PEU was founded by Count Coudenhove Kalergi, in 1923, as an informal body, for reviewing the development of Britain and continental Europe. At the same time, at an official level, the leading institution which had the necessary competence to deal with the reconciliation of European states was the League of Nations, which emerged as a result of post-WWI peace treaties. This organisation had issued a Manifest which called European states for unity and for the secure of human rights [3].

Unfortunately, due to tariff wars of the end of the 1920-s, European states pushed the world to the new arm conflict, which ended up in a new WWII. The main problem was inability to decrease the tariffs and get rid of quantitative trade restrictions which had previously emerged. Also, by the beginning of the 1930-s the idea of the creation any European political project was totally suspended and states started to prepare for the new war.

To sum up. It is suffice noting that after the WWI the window of new opportunities was opened for the European states to establish all-European organisations, where human rights and economic stability could be promoted. But due to personal ambitious and hostility, all these plans were suspended.

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FEDOROVA T. S.

National University «Odesa Law Academy»,
Associate Professor at the Department of International and European Law,
PhD in Law

THE ROLE OF ECONOMIC JUSTICE IN THE IMPLEMENTATION AND PROTECTION OF THE RIGHTS OF FOREIGN BUSINESS ENTITIES: THE EXPERIENCE AND PROSPECTS OF UKRAINIAN-CHINESE COOPERATION

Key words: *economic justice, foreign business entities, Ukrainian-Chinese cooperation.*

In the context of the emergence of a new model for economic development of China based on the principles of a platform economy [1], as well as taking into account the powerful developments in the field of national economic potential, the implementation of ambitious international projects, in particular, "One Belt – One Road", China currently presents not only a leading place in the Asia-Pacific region, but also throughout the world. This causes Ukraine's interest in the developing strategic partnerships not only with the European Union countries within the framework of the Association Agreement, but also with one of the largest countries in the world, although geographically remote, which is today's China, a country that serves as an important market for the sale of goods and investment and the partner for the national economy.

At the Ukrainian-Chinese Economic Forum "Prospects of co-operation within the "One Belt – One Road" Initiative held on July 4, 2018 at the Chamber of Commerce and Industry of Ukraine [2], Mr Liu Yun a trade and economic advisor to the Chinese Embassy in Ukraine, said, "Today, Ukraine is different from the one that was before . And to start the reforms are the bonuses and dividends for the development of prospective bilateralco-operation". The infrastructure, finance and IT sector have been identified among the most promising areas for the partnership development by the economic advisor. According to him, these directions have extraordinary opportunities for co-operation. In addition, the great potential of the bilateral partnership is expected in the field of agriculture, as well as in the industrial sector, chemical industry primarily.

According to the vector of the Ukrainian-Chinese economic dialogue, the issues of legal regulation of investment and entrepreneurial activity, improvement of the mechanisms of functioning of economic justice in Ukraine, and deepening of cooperation in the legal space of China are of the great urgency. This requires a comprehensive study of how to protect the rights of economic entities both within the jurisdiction of China and within the national legal framework.

At present, the issue of international trade in the foreign economic relations of Ukraine withthe *People's Republic* of *China* (PRC) is represented in the scientific works by such scholars as Van Peng, L. Halperin, P. Kamensky, V. Klimchik, Li Zhou, V. Levkovsky, Yu. Lupenko, Z. Makogon, X Meng, T. Molodchenko, M. Prysyazhnyuk, O. Slosko, M. Smikova, M. Matuli, O. Shpichak, M. Fleichuk, P. Chernik, Chen Hongji, and Zhang Yuan.

Afamous sinologist E.I.Kichanov noted: in order to know the country, it is necessary to know its law[3;C.3] At the present stage, the legal system of the Chinese state is undergoing the fifth stage of its development (from 2011 – to date). The Chinese legislator has stepped up efforts to significantly update the necessary legal acts for the country [4]. The questions of the development of the legal system in China were studied in the works of L.M.Gudoshnikov, E.I. Kichanov, P.V.Troshchinsky, Chan Bean Lin. At the same time, the problem of the peculiarities of the mechanisms’ implementation for the protection of the economic entities participating in the Ukrainian-Chinese trade, investment, business relations in Ukraine and in the People's Republic of China has been studied insufficiently. The further legalization of legal relationships within the framework of the functioning of the Institute of Economic Justice of Ukraine and the relevant institutes in the People's Republic of China will be required.

From the mid-2016 there has been a steady recovery in the global economy. At the same time, in 2018-2019, it was predicted that the economic growth rate should be maintained at the 2017 level while gradually becoming less balanced, as noted in the analytical study of the International Monetary Fund. The risks of declining global growth over the past six months of 2018 have increased, and the potential for the unexpected improvements has decreased [5]. As expected, in 2019 the economy in China will grow somewhat slower after the US trade measures recently announced in the area of solar panels, washing machines, steel, aluminum and other products manufactured in China.

However, China remains a powerful global economic agent whose foreign policy is aimed at economizing and active integration into the global trading system WTO, to which China became a member in 2001. In terms of trade flows, China is one of the four largest WTO members along with the EU, USA and Japan. The average annual growth rate of the country over the past thirty years has been 10.3%, indicating the dynamic growth and potential [6]. For the first time, the PRC became the largest economy in the world in 2014, surpassing the volumes of US goods and services production.

According to the International Monetary Fund, the volume of national economic production in China in 2014 was 17.6 trillion dollars, and in the US – 17.4 trillion dollars [7].

It is very indicative that in these circumstances, the Government of the People's Republic of China attaches great importance to the legal support of the development of economy and business. In 2017, the Ministry of Justice, the Ministry of Foreign Affairs, the Ministry of Trade and the Office of Legislative Bodies of the State Council of the People's Republic of China prepared conclusions on the industry development of the legal services related to foreign investment [8]. The Chinese legislator suggests that the development of the legal field is an important step in creating a fully-fledged legal service system based on the rule of law and facilitating the opening of all organizations. Since the 18thNational Congress of the CPC, the Chinese legal services sector in foreign affairs is developing relatively fast, the team of foreign legal services is steadily expanding and the external services are expanding while the quality of legal services is gradually improving, playing an important role in the protection of the legitimate rights and interests of Chinese citizens and legal entities abroad. With the help of high-quality and professional legal support, the Chinese side measures to strengthen China's foreign trade industry to a higher level. Among the main tasks of the development of legal services abroad was the need to provide legal services for the project "One Belt- One Road" and other major national development strategies. By developing pilot free-trade zones and other major national development strategies, the Chinese side, providing legal services, improves the level of openness of the economy comprehensively, encourages the practical exchange and cooperates with different countries and regions, in particular, the “One Belt – One Road” project in the respective areas and also provides the legal services for the development of international trade in goods and services, cross-border e-commerce, the procurement market, as well as new types of business, information technology of new generation, new energy resources, new materials and other new industries.

It should be noted that China's partners in the free-trade area are Chile, Costa Rica, New Zealand, Pakistan, Peru, Singapore, Switzerland and Iceland. China also provides the unilateral preferences to less developed countries [9].

The Ministry of Justice, the Ministry of Foreign Affairs, the Department of Commerce and the Legislative Affairs Office of the State Council issued the Opinions on the Development of the Foreign Legal Services Industry where it has been asserted that while performing practical legal activities abroad the legal system of China should be interpreted, especially in terms of the laws and regulations in the areas of investment, trade, finance and environmental protection, in particular with the view of improving the international understanding and knowledge of China's legal system.

Taking into account the foregoing, one can state that in Ukraine, within the framework of the Institute of Economic Justice, a sufficiently effective mechanism for the protection of foreign investments has been created, which may facilitate the entry of a Chinese investor into the Ukrainian market. At the same time, the issue of legal support of investment activity of Chinese business in Ukraine needs to be improved along with the urgency of stabilizing political processes in the country.

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ILYINA Y. P.

International Humanitarian University,
Associate Professor of the Department of International Law and Comparative Law, PhD in Law

REALIZATION OF MAINTENANCE OBLIGATIONS ON THE CONTENT OF CHILDREN IN SOME EUROPEAN COUNTRIES

In the given theses foreign experience on collecting payments for the maintenance of the child on performance by parents of parental obligations on this issue is considered.

Key words: *alimony, maintenance obligations, parents, child maintenance, rights.*

Attention should be paid to the fact that in foreign countries the recovery of maintenance for the maintenance of a child is quite a significant and topical issue. However, approaches to understanding this extremely important issue have a different understanding in countries.

Alimony obligations were studied by such well-known and foreign scholars as V. Antoshkina, L. Afanasyev, L. Baranova, K. Verkhovets, G. Grishin, N. Ershova, O. Kalitenko, Yu. Kuznetsova, V. Nikitina, V. Trumpet, S. Fursa and others.

Alimony obligations of parents in relation to the maintenance of children are related to maintenance obligations of the first turn. In this context, the point of view of L.V. Sapeiko, which recognizes the advisability of borrowing Swedish experience in national legislation, where the right to alimony is provided only for children and spouses. In all other cases, the security is provided for a set of funds provided by way of social security of a person from the state [1, p. 87].

In order to avoid confusion with other obligations, the law provides for the term «alimony», denoting by this term only the content that one citizen undertakes to provide to the other due to family relations existing between them [2, p. 64]. In particular, the maintenance obligations of parents on the maintenance of their children is a legal relationship, by virtue of which parents are obliged to perform it taking into account a set of legal facts, one of which is the fact of the child’s origin from the parents' data [3].

It should be noted that in fulfilling the maintenance obligations in many foreign countries, in particular in Italy and Switzerland, they are guided by the norms of the 1973 Hague Convention. «On the right to apply maintenance obligations» [4].

The said Convention applies to decisions rendered by a court or an administrative body of a contracting state for the maintenance of a child born both in marriage and out of wedlock: the recipient of the alimony and the alimony payer, or the alimony payer and the state body that collects reimbursement of funds paid to the alimony recipient.

Regarding to the legal regulation in Lithuania, it should be noted that family norms are part of the Lithuanian Civil Code [5], including the maintenance obligations of parents to support the child. It is envisaged that children, to comprehend the age of majority, are subordinate to the power (Article 3.155 of the Civil Code of Lithuania). Parents have the right to conclude an agreement between themselves according to which parents agree on the maintenance of their minor children, the size and form of this content must be approved by the court (Article 3.193 of the Civil Code of Lithuania). According to Lithuanian law, the obligation to maintain a child rests with the parent who lives separately from the child.

Article 3.198 of The Lithuanian Civil Code provides that the maintenance of two or more children is paid in proportion to one of the parents, but some objective reasons for the increase in the collection rate, such as a child's illness, are taken into account.

Lithuanian legislation provides for one parent to go to court regarding the recovery of child support. In accordance with Art. 197 of the Civil Code of Lithuania, recovery of funds occurs through the pledge (mortgage) procedure, which can also be applied to the defendant in court. If the court's decision is not executed by the respondent, the maintenance of the child is paid in respect of the property that is the subject of the pledge (mortgage).

In accordance with the Agreement between Ukraine and the Republic of Lithuania on legal assistance and legal relations in civil, family and criminal matters of 07.07.1993. [6] does not provide for the existence of rules regarding the settlement of legal conflicts between parents and children. But, in the art. 28 of the Agreement it is established that in accordance with the legislation of the Contracting Party, where one of the parents with the child is, is determined by the legislation of that country.

A similar norm exists in the legislation of Georgia, namely, in the Law of Georgia «On International Private Law» [8] which stipulates that when performing parental responsibilities for maintaining a child, the place of residence of the child or the citizenship of the child is taken into account.

Another regulation is supposed by the civil law of Greece, namely art. 18 of the Civil Code of Greece [9], where it is established that the relationship between parents and child is determined by the following sequence:

1) according to the law of the country of the last general citizenship of the parents;
2) according to the law of the country of their last joint residence;
3) according to the law of the country of which the child is a citizen.

According to the results of this study, it can be concluded that according to the legislation of foreign countries there are certain peculiarities regarding maintenance obligations for the maintenance of a child. Of course, taking into account the experience of the states of the European Union is important for the further reform of the family law system in Ukraine.

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KISLITSYNA I. O.

National University «Odesa Law Academy»,
Assistant Professor of the Department of Judiciary,
Law Enforcement Agencies and Advocacy, PhD in Law

THE RIGHT TO PROTECTION AS A SIGN OF A FAIR TRIAL IN JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS

The article researches the right to protection as one of the signs of a fair trial on the basis of the legislation of Ukraine and the practice of the European Court of Human Rights. On the basis of the decisions of the European Court of Human Rights, the importance of the right to protection is emphasized to comply with the rules of judicial review and the protection of human rights and freedoms in each state.

Key words: *the right to protection, court's judgement, trial, court, justice, European Court of Human Rights.*

The right to protection is one of the fundamental standards for criminal proceedings. The observance of this principle depends on the outcome of the pre-trial investigation of criminal proceedings and court proceedings.

Violation of the principle of the right to a defense is the basis for appealing a court decision, which emphasizes the relevance of the subject under study.

The right to protection is enshrined in the national legislation of European countries, including Ukraine. Part 1 of Article 63 of the Constitution of Ukraine provides that a suspect, accused or defendant shall have the right to protection [1]. In accordance with Article 20 of the Criminal Procedure Code of Ukraine (CPC), a suspect, accused, acquitted, the convicted person has the right to protection, which is to provide him with the opportunity to provide oral or written explanations on suspicion or accusation, the right to collect and submit evidence, to take to participate personally in criminal proceedings, to use the lawyer's assistance, as well as to exercise other procedural rights provided for by the CPC [2]. It should be noted that the function of a defense counsel in criminal proceedings in accordance with Ukrainian legislation is performed exclusively by a lawyer, which ensures a high level of protection of legal assistance. As correctly noted by N.M. Bakayanova, changes to Art. 131-1 of the Constitution of Ukraine increase the role of advocacy in public relations, require lawyers to perform their professional duties at a high professional level [3, p. 3].

The CPC clearly identifies cases in which the defense counsel's participation is compulsory. Thus, since the person has acquired the status of a suspect in a criminal proceeding concerning particularly serious crimes, participation of a defender is mandatory. The legislator also provided for the mandatory participation of a defense counsel in the following cases: in respect of persons suspected or accused of committing a criminal offense under the age of 18; with regard to persons for whom enforcement of coercive measures of educational nature is foreseen; regarding persons who, due to mental or physical defects (dumb, deaf, blind, etc.) are not able to fully realize their rights; concerning persons who do not speak the language of criminal proceedings; with regard to persons for whom the use of compulsory measures of a medical nature is foreseen or the issue of their application is being resolved; on rehabilitation of a deceased person; with respect to persons in respect of which a special pre-trial investigation or a special judicial proceeding is conducted; in the case of an agreement between the prosecutor and the suspect or accused of the recognition of guilt [2]. However, there are cases in which a person is not provided with a lawyer, although the case relates to those in which the defense counsel's participation is compulsory.

According to this issue, it is important to study the practice of the European Court of Human Rights. After all, according to Art. 2 of the Law of Ukraine "On Enforcement of Judgments and Practice of the European Court of Human Rights" [4] the judgment of the European Court of Human Rights is binding on Ukraine pursuant to Article 46 of the Convention for the Protection of Human Rights and Fundamental Freedoms [5]. An important step in this aspect is the introduction of amendments to the Constitution in 2016. These amendments were enshrined in Article 55, Part 5 of the Constitution of Ukraine, the right of every person to apply for the protection of their rights and freedoms to the relevant international judicial institutions or relevant bodies of international organizations after the use of all national remedies, the member or participant of which is Ukraine [1].

The European Court of Human Rights has repeatedly drawn attention to the inadmissibility of violating the right to protection. Thus, in the case of Nechiporuk and Yonkalo v. Ukraine (application no. 42310/04, judgment of 21 April 2011), the applicant argued that the national authorities did not effectively investigate his complaint of torture in the police. The Government objected to this statement and argued that the effectiveness of the investigation had been verified and confirmed by the courts of two instances during the trial of the applicant. The European Court of Human Rights came to the conclusion that the authorities did not adequately try to find out what had happened to the applicant at the Southwest Police Department. In its decision, the European Court of Human Rights stated that access to a lawyer should be provided at the first interrogation of a suspect by police officers, except in cases where, in the particular circumstances of the case, it has been demonstrated that there are good reasons for limiting such a right. The right to protection will in principle be irreparably violated if the indictments obtained during interrogation by law enforcement agencies without access to a lawyer will be used for the purpose of her conviction. The European Court of Human Rights has consistently indicated that ensuring access to a lawyer at an early stage is a procedural guarantee of the right not to testify against themselves and the main guarantee of the prevention of ill-treatment, noting the particular vulnerability of the accused at the initial stages of proceedings when he falls into a stressful situation and simultaneously faced with the increasingly complex provisions of criminal law. Any exception to the exercise of this right must be clearly defined, and its action must be strictly limited in time. These principles are particularly relevant in the case of serious accusations, since precisely in the case of a person facing the most severe punishment, his right to a fair trial should be ensured in a democratic society as much as possible [6, p. 16-18].

In another case, Bassenko v. Ukraine (application no. 24213/08, judgment of November 26, 2015), the applicant complained that he had no effective means of legal protection in connection with alleged ill-treatment with him. The applicant noted that the delays in the investigation of the criminal case against S. led to the fact that his civil action was ineffective means of legal protection. The European Court of Human Rights in its decision noted that as a result of unjustified delay in criminal proceedings from the time of the attack on the applicant until the applicant learned of the conviction of S., and therefore could probably sue him for damages, that is, until September 25 2007, five years and seven months passed. Accordingly, this claim can not be regarded as capable of giving due and sufficient reparation for the violation of Article 3 of the Convention in the particular circumstances of the case. In view of this, the European Court of Human Rights concludes that the shortcomings of the criminal proceedings did not allow the applicant to be compensated in a timely manner. This meant that, in theory, the compensatory remedies available to the applicant under national law in practice in the particular circumstances of the case were ineffective.

Consequently, there has been a violation of Article 13 of the Convention [7, p. 10-14]. Thus, the European Court of Human Rights acknowledged that due to the long duration of the pre-trial investigation, the detainee was illegally deprived of legal remedies.

Interestingly, that in the case of Bartha v. Georgia (application no. 10978/06), the European Court of Human Rights came to the conclusion that the refusal of the court to postpone a meeting at the request of a lawyer who participated in another process, and consideration of a case without a lawyer is a violation Art. 6 (right to a fair trial) of the Convention for the Protection of Human Rights and Fundamental Freedoms. Lawyer Barataya could not take part in the proceedings (labor dispute), because at that very time he was involved in another hearing. The lawyer informed the court about this and filed a petition for the postponement of the meeting. Bartha also demanded postponement of consideration of the case, refusing to take part in a hearing without a lawyer. However, the court passed an in absentia decision to reject the claim. The lawyer tried unsuccessfully to challenge this decision. However, the higher courts came to the conclusion that, in accordance with national law, there was no justification for the refusal to participate in the hearing, and that the participation of the lawyer in another hearing was not a valid reason for the annulment of the decision adopted in absentia. In addition, they found that Mr. Bartha had been warned by a first-degree judge of the consequences of his refusal to attend the hearing. Bartha appealed to the European Court of Human Rights. Referring to Article 6 of the Convention, he argued that the decision by correspondence deprived him of the opportunity to take part in proceedings on an equal basis with the other party represented by a lawyer [8].

As a conclusion should be said, that the right to protection, as an important element of the right to a fair trial, is given considerable attention in the decisions of the European Court of Human Rights. The study of the practice of the European Court of Human Rights and the use of the findings of this court as a source of law plays an important role in respecting the basic principles of legal proceedings and ensuring the protection of human rights and freedoms in each state.

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