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POSITION OF JUDICIAL PRECEDENT OF THE EUROPEAN COURT OF HUMAN RIGHTS IN SELECTED COUNTRIES

СТАТУС СУДОВОГО ПРЕЦЕДЕНТУ ЄВРОПЕЙСЬКОГО СУДУ З ПРАВ ЛЮДИНИ В ОКРЕМИХ ДЕРЖАВАХ

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The article deals with the place of case-law of the European Court of Human Rights in the national legal order in selected countries of the continental legal system on the example of Ukraine and the Slovak Republic. In particular, the status of decisions of the European Court of Human Rights under national law and their relationship to the rules of international law will be taken into analysis. Particular attention is paid to the findings of the relevant constitutional courts on determining the place of case-law of the European Court of Human Rights in the national legal order. The article considers the existing scientific debate on the scope of the case-law of the European Court of Human Rights, which should be applied by national courts.

The author assumes the subsidiary nature of the rulings of the European Court of Human Rights and the fact that the rulings are not only a recommendation but constitute a soft law and are based on the principle that national law may define the place and role of different national public authorities in different ways. Thus, the binding nature of the rulings of the European Court of Human Rights may apply in different ways to the legislative, executive and judicial areas.

Analysis of research on the role and significance of the case-law of the European Court of Human Rights is considering the legal position of the highest levels of the judicial system of Ukraine, the Slovak Republic and concludes that court decisions cannot be considered as mandatory for usage of law norms in comparison to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms. The author suggests that this issue is similarly regulated in other countries of the European legal system, but with its distinct peculiarities. The principle that the case-law of the European Court of Human Rights is considered as fundamental by its legal nature and contains interpretations as to the application of convention law. At the same time, national courts in practice often refer in their decisions to the case-law of the European Court of Human Rights as a doctrinal source of law, given the authority of the Court itself as an international organization.

Key words: Convention for the Protection of Human Rights and Fundamental Freedoms, the case-law, implementation of judgments in the case-law of national courts, international court, constitutional courts, the continental legal system, legislation of Ukraine, legislation of Slovak republic.

У статті розглядається місце судової практики Європейського суду з прав людини в національному правовому порядку окремих країн континентальної правової системи на прикладі України та Словацької Республіки. Зокрема, розглянуто статус рішень Європейського суду з прав людини в національному законодавстві та його взаємозв'язку з нормами міжнародного права. Особлива увага приділяється висновкам відповідних конституційних судів щодо визначення місця судової практики Європейського суду з прав людини в національному правовому порядку. У статті враховано наукову дискусію щодо визначення обсягу судової практики Європейського суду з прав людини, який підлягає обов'язковому застосуванню національними судами.

Автор бере до уваги субсидіарний характер рішень Європейського суду з прав людини, а також той факт, що рішення не є лише рекомендаціями, але є так званим «м'яким правом», але виходить із принципу, згідно з яким національне законодавство визначає місце і роль різних національних органів державної влади по-різному, у зв'язку з чим обов'язковість рішень Європейського суду з прав людини може по-різному застосовуватися у сферах законодавчої, виконавчої та судової влади.

Аналіз дослідження ролі та значення судової практики Європейського суду з прав людини з урахуванням правової позиції судів найвищих ланок судової системи України та Словацької Республіки дає змогу дійти висновку, що судові рішення не можуть вважатися обов'язковими для застосування правовими нормами, на відміну від положень Конвенції про захист прав людини та основоположних свобод, які є нормами прямої дії. Автор припускає, що подібним чином це питання врегульоване також в інших країнах континентальної правової системи, але зі своїми особливостями. Основоположним є принцип, що судова практика Європейського суду з прав людини фактично за своєю юридичною природою містить тлумачення щодо застосування конвенційних норм права. При цьому національні суди на практиці часто в своїх рішеннях посилаються на рішення Європейського суду з прав людини як доктринальне джерело права, враховуючи авторитет самого суду як міжнародної організації.

Ключові слова: Конвенція про захист прав людини і основоположних свобод, судова практика, впровадження прецедентних рішень у судовій практиці національних судів, міжнародний суд, конституційні суди, континентальна правова система, законодавство України, законодавство Словацької республіки.

Formulation of the problem. Legal systems include not only their own sources of law, but also other means of organization of integration relations of states, including international organizations. In international organizations, bodies have been set up with the power to take binding decisions for States Parties and to monitor its implementation, particularly it concerns the European Court of Human Rights.

The independence of the national legal order, which is an integral part of state sovereignty, requires that the approximation and unification of national legal norms has to be based on a comprehensive study of national legal practice and international experience. Therefore, in some individual states, generally accepted rules of international law are not incorporated into national law, and no rule of international law is given more legal power than the constitution. In any legal system which gives international law a status lower than that of a national constitution, it is the constitution that will take precedence over international law if its rules are not consistent. This is in terms of national law. From the point of view of international law, in case of a conflict between the provisions of the conventional law and a national constitution, international law requires the constitution has to be in conformity with the convention norms, otherwise there will be a conflict between the two legal systems.

The problem of the application of the European Court of Human Rights decisions at national level raises many questions that cannot be resolved in the context of international law, without considering national legislation. For better understanding of the position of the case-law of the European Court of Human Rights in national law, the research in this article is carried out on the basis of the national legislation of two individual states of the European legal system: Ukraine and the Slovak Republic.

The aim of the article is to reveal the place and role of decisions of the European Court of Human Rights in the national legal order in individual countries of the continental legal system. In the context of the study, the author aims to compare the role of judicial practice in the legal system of two independent countries and to determine whether European Court of Human Rights decisions can be considered precedent, that is mandatory for usage of law.

Analysis of publications in which there is a solution of this problem. The problems of the role and place case-law of the European Court of Human Rights in national law has been studied by many scholars. The most significant works have been done by V. Zavgorodniy, K. Ismaiylov, P. Synycyn, G. Lysenko, S. Volkova, V. Ptashynska, N. Liashenko, O. Kochura and others. Among Slovak scholars, the research of Professor Jan Svak plays a significant role, who first of all considers issues from the context of constitutional law in its relation to the norms of international law. However, the presence of a wide range of theories and opinions on this subject indicates the lack of unanimity in solving the problem and, consequently, the need for further study.

Basic content. The Convention for the Protection of Human Rights and Fundamental Freedoms**,** which applies to the member states of the Council of Europe following the ratification process, is a fundamental document regulating human rights and fundamental freedoms at international level. In accordance with Article 46, par. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the Convention), the Contracting States undertake to comply with the final judgments of the Court in all matters in which they were acting as parties [1].

It is well known principle that the European Court of Human Rights relies on the general rule of the *pacta sunt servanda* principle that States Parties must, in good faith, comply with all the requirements of the Convention and, as a consequence, recognize the unconditional binding nature of decisions of the European Court of Justice human rights against them. The European Court of Human Rights takes the view that, since the Vienna Convention on the Law of Treaties [2] prohibits States from invoking their national law as a fact which exempts them from implementing existing international treaties, the provisions of national constitutions cannot be regarded as having priority over the Convention, the power of the Institute shall apply only to the national legislation. In the context of the above mentioned, the provisions of the Convention shall apply to all legislations and measures, regardless of its legal nature.

According to the Convention, the case-law of the European Court of Human Rights is a subsidiary mechanism for the protection of human rights and freedoms and the primary responsibility for its protection lies in national legal systems. Article no. 1 of the Convention focuses on the fact that States Parties are obliged to guarantee to all persons within their jurisdiction the rights and freedoms laid down in this Convention. Accordingly, the Contracting States have a priori broad "freedom of will" in choosing the means and methods to deal with legal issues relating to the exercise and protection of the rights and freedoms protected by the Convention. In doing so, they cannot break away from the peculiarities of the historical, economic, political, cultural and other development of their own state, without ignoring which implementation of the provisions of the Convention and the European Court of Human Rights case-law has the risk of creating problems of protecting human and civil rights and freedoms.

The position of the case-law of the European Court of Human Rights in the national legal system of Ukraine. Ukraine has ratified the Convention by Act No. 475/97-BP on July 17, 1997 on the ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms, the First Protocol and Protocols No. 2, 4, 7 and 11 to the Convention [3] by which it undertakes to fulfil the obligations of a Contracting Party for the enforcement of judgments of the European Court of Human Rights.

Given that the Parliament of Ukraine ratified the Convention, in accordance with Art. 9 of the Constitution of Ukraine [4]. The Convention forms an integral part of national legislation. According to Art. 19, par. 1 of the Act of Ukraine No. 1906-IV on June 29, 2004 on the international treaties of Ukraine [5], the legal norms of international treaties that have been ratified by Ukraine will be applied in the same way as the provisions of national legislation.

In order to implement the mechanism for the implementation of the decisions of the European Court of Human Rights in Ukraine, the Act of Ukraine No. 3477-IV on February 23, 2006 on the enforcement of judgments and the application of the case-law of the European Court of Human Rights [6], Art. 2 par. 1 establishes the obligation of Ukraine to implement decisions of the court.

The implementation of judgments in the case-law of national courts may be considered as a specific and specific form of implementation of judgments of the European Court of Human Rights. The national courts implement the Convention and the case-law of the European Court of Human Rights as a source of law during the case. According to Art. 17 and 18 of the Act of Ukraine No. 3477-IV on February 23, 2006 on the enforcement of judgments and the application of the case-law of the European Court of Human Rights, for the purpose of referring to the text of the Convention or the decision, the national courts shall use an official translation of the Convention into Ukrainian. If the decision is not translated, or if there is an inadequacy between the translation and the original text, the court will use the original one [6].

However, there has been a discussion among Ukrainian scholars in examining the place and role of European Court of Human Rights rulings in the national legal order of Ukraine as a member of the Council of Europe (in particular as to whether the decisions of the European Court of Human Rights are a precedent for national courts). Two approaches are distinguished: 1) recognition as a precedent only for decisions on a case against their own state; (2) recognition of all ECHR rulings as a precedent for the national law enforcement system. Given the very nature of European Court of Human Rights rulings that combine legal rules relating to a specific case with reference to previous ECHR legal positions, the latter approach better reflects ECHR case-law. Furthermore, compliance by the European Court of Human Rights with the positions (standards, principles) of such states can help to improve overall respect for human rights by the state and, as a result, can significantly reduce the number of actions against each other [7, p. 13].

Instead, the Act of Ukraine on the enforcement of judgments and the application of the case-law of the European Court of Human Rights presupposes that Ukraine will only implement those decisions of the European Court of Human Rights in which Ukraine is a party to the proceedings. However, Parties to the Convention are the addressees of all judicial decisions and should participate in their review and application, as the European Court of Human Rights considers all its previous decisions as a precedent. It is therefore necessary to define such a mechanism at legislative level [8, p. 3].

The Commissioner for Human Rights of the Parliament of Ukraine tried to solve the problem of the place of case-law of the European Court of Human Rights in Ukraine by appealing to the Constitutional Court of Ukraine for this purpose. However, the Judgment of the Constitutional Court on May 31, 2018 № 28-y/2018 in case № 1-77/2018 (4117/17) refused to open proceedings on the grounds that the decision on the application by the courts of Ukraine of the decisions of the European Court of Human Rights, both in general and in terms of their priority, does not belong to the powers of the Constitutional Court of Ukraine, but is provided by the Supreme Court of Ukraine [9].

However, the available court decisions of the Supreme Court of Ukraine on this issue do not provide a clear unanimous answer on how to solve the problem. For example, according to part 12 of the Resolution of the Plenum of the Supreme Court of Ukraine about Judgment in a Civil Case №14 on December 18, 2009, if necessary, in the vengeful part of the decision there should be references to the decisions of the European Court of Human Rights which are the source of law and are applicable in this case [10]. Similar explanations have been provided by other specialized courts of Ukraine. But such wording does not decide which decisions of the European Court of Human Rights can be considered as a source of law and in what relation they are with other normative legal acts.

The position of the case-law of the European Court of Human Rights in the national legal system of the Slovak Republic. The case-law of the European Court of Human Rights has a similar position in the national legal order of the Slovak Republic as in Ukraine. Whereas the Slovak Republic, in accordance with the provisions of the Declaration of the National Council on the membership of the Slovak Republic in the Council of Europe and the assumption of obligations under international treaties, approved by the national law of the Slovak Republic by Resolution No. 3 on December 3, 1992 has also made a commitment to be bound by the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Convention forms part of international treaties that have become part of the legal order of the Slovak Republic.

According to Art. 7, par. 5 of the Act No. 460/1992 Coll. on September 1, 1992 of the Constitution of the Slovak Republic, international treaties on human rights and fundamental freedoms, international treaties for which implementation is not required by law, and international treaties that directly establish the rights or obligations of natural or legal persons and which have been ratified and proclaimed in the manner prescribed by law take precedence over laws [11].

According to Art. 154c of the Constitution of the Slovak Republic, international treaties on human rights and fundamental freedoms ratified by the Slovak Republic and proclaimed in the manner laid down by law before the entry into force of this constitutional law are part of its legal order and take precedence over the law if they provide a wider range of constitutional rights and freedoms.

Judges are independent in the performance of their duties and are bound by the constitution, the constitutional law, the international treaty and the law. According to § 2 par. 3 of Act No. 385/2000 Coll. on October 5, 2000 on Judges and Judges and on Amendments to Certain Acts, the judge is independent in the performance of his office and is bound only by the Constitution of the Slovak Republic, constitutional law, international treaty according to Art. 7, par. 2 and 5 of the Constitution of the Slovak Republic and by law. The legal opinion of the Constitutional Court of the Slovak Republic contained in its decision issued in proceedings under Art. 1 of the Constitution of the Slovak Republic on the basis of a court proposal is binding on the court [12].

According to § 193 of Act No. 160/2015 Coll. on May 21, 2015 Civil Disputes Code, the court is bound by a decision of the Constitutional Court on whether a certain legal regulation is not in accordance with the Constitution of the Slovak Republic, the constitutional law or an international treaty binding on the Slovak Republic. The court is also bound by a decision of the Constitutional Court or the European Court of Human Rights concerning fundamental human rights and freedoms [13].

As we can see, the legal norms of Slovak national legislation define the Convention (as a ratified international treaty) as a source of Slovak national law. At the same time, in determining the role of the case-law of the European Court of Human Rights, Slovak legislation defines it as binding for implementation, but the ECHR decisions themselves do not have effects on similar legal relations.

In Judgment I. ÚS 239/04 on October 26, 2005, the Constitutional Court noted that, pursuant to Art. 152 par. 4 of the Constitution, the interpretation and application of constitutional laws, laws and other generally binding legal regulations shall be in accordance with the Constitution and at the same time within the meaning of Art. 154c par. 1 of the Constitution, the relevant international treaties, including the Convention, take precedence over laws if they provide for a wider range of constitutional rights and freedoms. It is apparent from the interlinking of those provisions that the Convention and the case-law relating thereto constitute binding national interpretative directives for the application and application of the law of fundamental rights and freedoms enshrined in the second Title of the Constitution for national authorities and thus cannot exceed (eg I. ÚS 36/02) [14].

It is apparent from the interdependence of those provisions that the Convention and the case-law applicable to it they are for the national authorities binding interpretative directives for the interpretation and application of the legislation on fundamental rights and freedoms enshrined in the second title of the Constitution, thereby standardizing a framework that these authorities cannot exceed in a particular case (eg I. ÚS 36/02).

Conclusions. It is clear that the case-law of the European Court of Human Rights has a significant impact on national law in individual states. At the same time, it is not possible to say that decisions European Court of Human Rights are sources of national law or separate legislation.

The analysis of the national law of Ukraine and the Slovak Republic shows that at the legislative level the issue of the position case-law of the European Court of Human Rights is very similar, which does not give grounds to claim that the same issue will be resolved in other countries by the continental legal system. At the same time, it is interesting that in Ukraine the Constitutional Court in resolving this problem notes that this issue is not within its competence. Instead, the Constitutional Court of the Slovak Republic clearly states that the decisions of the European Court of Human Rights create and reflect the position of the application of norms and rules governing fundamental human rights and freedoms. However, it can develop new approaches to understanding the Convention that are in line with the current state of human rights protection in States Parties. As we can see, case-law of the European Court of Human Rights are more of an interpretation of the legal provisions contained in the Convention and in similar court cases is of an explanatory and compensatory nature rather than a generally binding rule.

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