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## Topical Issues of the Application of the Case-Law of the European Court of Human Rights in the Criminal Process of Ukraine

Актуальні питання застосування практики Європейського суду з прав людини в кримінальному процесі України

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### Abstract

The purpose of the article is to identify and analyze topical issues of the application of the case-law of the European Court of Human Rights (hereinafter - ECtHR) in the context of the implementation of the current criminal procedural legislation of Ukraine. To achieve this purpose, the authors have studied the scientific positions of the lawyers, the relevant provisions of the current legislation of Ukraine, the requirements of international legal acts and the case-law of the ECtHR. The general provisions of the criminal process science were methodological basis of the study. The authors of the article used the following methods of scientific knowledge: systematic, logical, semantic, comparative and documentary analysis. The place of the case-law of the ECtHR in the system of national legislation has been clarified, in particular the decisions of this Court are binding throughout Ukraine, and national courts have to apply the case-law of the ECtHR as a source of law. It is argued that the right of Ukrainian communities to seek the protection of their rights and freedoms under the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter - ECHR) is an additional guarantee against arbitrariness of the public authorities and

### Анотація

Мета статті полягає у виявленні та аналізі актуальних питань застосування практики Європейського суду з прав людини (далі - ЄСПЛ) в контексті правореалізації чинного кримінального процесуального законодавства України. Задля цього авторами досліджено наукові позиції правників, відповідні положення чинного законодавства України, вимоги міжнародних правових актів і практику ЄСПЛ. Методологічною основою дослідження склали загальні положення науки кримінального процесу, а також використано такі методи наукового пізнання, як: системний, логіко-семантичний, порівняльно-правовий та документального аналізу. З'ясовано місце прецедентної практики ЄСПЛ у системі національного законодавства, зокрема, що рішення цього Суду є обов'язковими для виконання на всій території України, а національні суди мають застосовувати практику ЄСПЛ як джерело права. Аргументовано, що право громадян України звернутися за захистом своїх прав і свобод, передбачених Конвенцією про захист прав людини і основоположних свобод 1950 року (далі - КЗПЛ), є додатковою гарантією від свавілля з боку державних органів і посадових осіб, які допустили їх порушення чи незаконне

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officials who violated or restricted them. It was stated that even after implementation of the universally recognized norms and principles of international law in the sphere of protection of human rights and freedoms into current criminal procedural legislation of Ukraine, the facts of their violation occur. This, in turn, leads to the adoption of the ECtHR decisions against Ukraine, in which 90% of cases state violations of fundamental rights and freedoms guaranteed by the ECHR.

**Key words:** human rights and freedoms, case-law of the European Court of Human Rights, criminal procedure.

### Introduction

According to the study, the XX century was marked by significant democratic changes in the field of protection of human rights and freedoms, which necessitated the formation of an appropriate legal mechanism for their protection. To this end, Article 55 of the Constitution of Ukraine (1996) enshrines the right of citizens of Ukraine, after the use of all national remedies, to apply for the protection of their rights and freedoms to the relevant judicial institutions or to the relevant bodies of international organizations, which is an international legal guarantee of the rights and freedoms of citizens. Regarding this constitutional prescription, O. M. Solonenko (2011, pp. 100-101) noted that international legal guarantees of rights and freedoms are important in the mechanism of ensuring rights and freedoms provided for by international treaties, conventions, declarations and other international documents, are the system of international norms, principles, legal and organizational means, conditions and requirements by which they exercise the compliance, security, protection of human rights, freedoms and legitimate interests.

Ukraine's orientation towards EU integration implies a commitment to the international community to ensure that the national legal system conforms to the standards of the European community, including the creation of an effective mechanism for the protection of human rights and citizens (Arakelian, Ivanchenko & Todoshchak, 2020, p. 61).

The issue of the application of norms of international legal acts and case-law of the ECtHR in the criminal process of Ukraine is very topical and important. First of all, it is explained by the fact that according to Article 9 of the

обмеження. Констатовано, що навіть після імплементації до чинного кримінального процесуального законодавства України загальновизначених норм і принципів міжнародно-правових актів у сфері захисту прав і свобод людини в практичній діяльності залишаються факти їх порушення. Це, у свою чергу, призводить до ухвалення ЄСПЛ рішень проти України, в яких у 90 % випадках констатує порушення основоположних прав і свобод, гарантованих КЗПЛ.

**Ключові слова:** права і свободи людини, практики Європейського суду з прав людини, кримінальний процес.

Constitution of Ukraine (1996), the current international treaties, the consent of which was provided by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine, and in accordance with Article 17 of the Law of Ukraine "On the enforcement of judgments and the application of the case-law of the European Court of Human Rights" national courts should apply the Convention and the case-law of the Court as a source of law. Moreover, the strengthening of European integration processes in Ukraine requires aligning the current criminal procedural legislation with international legal acts, since there are a lot of problems both in the legislation itself and in the practice of its application.

### Theoretical framework

A considerable number of scholars have paid attention to the study of various aspects concerning both the general problems of the application of the case-law of the European Court of Human Rights and in the sphere of criminal procedure. The works of such scientists as: Arakelian M. R. (2014), Costa J. P. (2011), Drozdov O. (2019), Evgrafov P. (2005), Ianovska O. (2013a), Ianovska O. (2013b), Mazur M. V. (2006), Overchuk S. V. (2016), Pepelyaev S. G. (2005), Shevchuk S. (2007), Solonenko O. M. (2011), Svyatotska V. (2011), Tolochko O. (2012), Zhukorska Ya. M. (2014) and other should be noted.

Particular attention has been given to this issue after the adoption of a law "On the enforcement of judgments and the application of the case-law of the European Court of Human Rights" (2006) by the Government of Ukraine. In particular, this Law regulates relations emanating from:

- a) *the State's obligation to enforce judgments of the ECtHR in cases against Ukraine;*
- b) *the necessity to eliminate reasons of violation by Ukraine of the ECHR and protocols thereto;*
- c) *the need to implement European human rights standards into legal and administrative practice of Ukraine;*
- d) *the necessity to create conditions to reduce the number of applications before the ECtHR against Ukraine.*

In addition, it should be noted that in accordance with the provisions of Article 46 of the ECHR (1950), the decisions of the ECtHR's are binding, including for Ukraine, which ratified the said Convention on July 17, 1997, thereby fully recognizing in its territory the effect of Article 25 of the ECHR on recognition of the competence of the ECtHR.

### **Methodology**

The methodological basis for writing the article was the set of methods and techniques of scientific knowledge that are currently used in legal literature. In particular, the authors used the following methods to achieve this goal and to provide science-based conclusions.

The main method for writing this scientific work was the analysis method. For example, the analysis method allowed to study many decisions of the ECtHR, among which *Soldatenko v. Ukraine* (2008), *Dubovik v. Ukraine Case* (2009), *Chaney v. Ukraine* (2015), *Gal v. Ukraine* (2015), etc.

As a general scientific method, a systematic approach was used to identify the problematic issues of the application of the case-law of the ECtHR in the criminal process of Ukraine. In particular, it has been established that for many years Ukraine has been in the top three among states with an indicator of the implementation of decisions of the ECHR.

Furthermore, the logico-semantic method provided an opportunity to explain the importance of the case-law of the ECtHR in criminal proceedings and its impact on the ensuring of fundamental rights and freedoms guaranteed to every person by the ECHR.

The comparative legal method was applied to analyze the current state of criminal justice and in implementing of the case-law of the ECtHR during its exercising.

Using the method of documentary analysis, science-based conclusions and suggestions on the further application of the case-law of the ECtHR in the criminal process of Ukraine were formed.

### **Results and discussion**

In order that humanistic ideas, focusing on human rights and dignity, proclaimed by the European international community would remain not only declarative slogans and dreams, but receive their life and effective implementation, it was necessary, first, to formulate them in the relevant regulatory documents, and secondly, to create an international institution that could establish a regime of the compliance with, development and realization of human rights in Europe. Therefore, in order to monitor compliance by the Member States with the norms of the ECHR, an institutional legal mechanism for the protection of the rights, freedoms and legitimate interests of the individual, namely the European Court of Human Rights, has been established at the international level for more than 50 years (Mazur et al., 2006). Thus, this international court has a key role and importance in ensuring a clear and effective control over the implementation by the Member States (parties) of the said Convention of their obligations to protect and respect the universally recognized human rights and fundamental freedoms. It is this judicial international institution that guarantees each person his or her rights and freedoms, and in case of their violation, plays the role of judicial control at the international level. As a result of its activities, the ECtHR produces legal positions that are reflected in its decisions, which are binding on the Member States (Parties) to the Convention and cannot be challenged. As a result of its activities, the ECtHR forms legal positions that are reflected in its decisions, which are binding for the Member States (Parties) to the Convention and cannot be challenged.

Today, all democratic, rule of law countries recognize the authority of the ECtHR, since their meaning is reflected in humanity, namely, the development of a mechanism for the legal protection of human freedom, the promotion of legislation that can ensure equality of all citizens in the opportunities for their social expression, that is, equal legal protection and individual responsibility (Pepelyaev, 2005, p. 13–14; Ianovska, 2013, p. 12). To support the expressed positions, we add S. V. Overchuk's statement (2016) about the recognition of the jurisdiction of the European Court of Human Rights, the reform of law enforcement and human rights bodies

require the definition of universal European standards in the field of law, their implementation into national law and a change in the legal aid paradigm. The Legal Aid Institute in Ukraine experiences great changes: a new system of free legal aid is being formed, the field of advocacy is expanding, procedural and special legislation is being updated. In this respect, the Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights play the role of a legal guideline for the protection of human rights in the country.

In addition, as stated in the information letter of the Ministry of Justice of Ukraine on the implementation of ECtHR decisions, the implementation of its decisions is identified not only as material compensation or the state's additional individual measures aimed at eliminating a specific violation identified in the decision of the European Court, but, above all, measures of a general nature, which will make it impossible (eliminate) the grounds for bringing similar application against Ukraine in the future. The practice of the European Court regarding the interpretation of the rules of the Convention is based on the doctrine of judicial precedent, the content of which is binding on the judicial authorities of their previous decisions (*stare decisis*). The basis of judicial precedent is the *ratio decidendi* (Latin - the basis for decision). It is set out in the reasoning part of the decision and is a legal position (judicial standard) - an explanation of why this is the case. To justify this position, judges, taking decision on the case, apply the rules of law, previous precedents and considerations (motivation) of judges in their adoption, quotations from authoritative doctrinal sources, references to foreign precedents, etc. There are certain difficulties in distinguishing this legal position, since the reasoning part of the decision does not contain its clear formulation, as, say, the legal provisions in the Law (Shevchuk, 2007, p. 53; Tolochko, 2012, p. 57). For the moment, ECtHR is one of the most respected and effective human rights institutions, so its decisions have the potential to create a platform to optimize and improve the application of legal rules and legal relations in case of gaps in national law. The European Court's interpretive work also contributes to the standardization of human rights beliefs, since the first decisions were taken against Ukraine, it can be stated that there is an active and consistent alignment of national law with Council of Europe standards as expressed in ECtHR case law. Such coordination is carried out both at the stage of rulemaking and at the stage of implementation of

law (Tsiura, Kharchenko, & Sabodash, 2020, p. 197, 198).

The European Court draws up and formulates legal positions on the interpretation of convention rules. Such established positions to understand the convention norms have general application, which guide the ECtHR in the consideration of other similar cases, and member States of the Council of Europe in the field of human rights and fundamental freedoms (Evgrafov & Tykhyi, 2005, p. 82). Therefore, the case-law of the ECtHR is binding and therefore the legislator must take it into account both in the application of criminal procedural legislation and its improvement in general. In view of the fact that a person has the right to apply to the competent international judicial institutions and international organizations only after the use of all remedies at the national level, human rights protection can be considered as a system of legal norms enshrined in the Constitution and international legal acts, and the activity of competent entities aimed at implementing, preventing violations and a remedy.

With the adoption in 2006 of the Law of Ukraine "On the enforcement of judgments and the application of the case-law of the European Court of Human Rights", a mechanism for the implementation of ECtHR legal positions has been launched, which allows borrowing the best concepts and rules of a fair trial and even preventing problems in practice. This Law regulates relations emanating from: the State's obligation to enforce judgments of the ECtHR in cases against Ukraine; the necessity to eliminate reasons of violation by Ukraine of the Convention for the Protection of Human Rights and Fundamental Freedoms and protocols thereto; the need to implement European human rights standards into legal and administrative practice of Ukraine; and the necessity to create conditions to reduce the number of applications before the European Court of Human Rights against Ukraine. Unfortunately, this status of the judgments of the ECtHR has not been properly adapted yet. This is confirmed by the fact that over the last 10 years, Ukraine has not implemented 67 % of the total number of leading judgments of the ECtHR against Ukraine, namely, 117 judgments are still pending implementation. Such data are provided by the European Implementation Network (EIN), which provided an interactive map with information on the 47 countries of Europe that have signed the European Convention for the Protection of Human Rights and Fundamental Freedoms (European implementation network). Leading

judgments of the ECtHR, for the EIN, are the judgments that identify a new significant or systemic problem in the country. Each leading judgment presents a range of human rights issues that need to be addressed - a broader problem which affects society. In the view of the EIN, if leading judgments are not implemented, that means that the major human rights issues are not addressed. Assessing the part of leading judgments that are implemented is the best way to assess whether a country introduces general reforms to implement the judgments of the ECtHR. Ukraine's implementation of such judgments is one of the worst in Europe (67 %). Only Hungary (74 %) and Russia (89 %) have the highest percentage of the judgments of the ECtHR which are not implemented. Turkey is close to Ukraine with 63 % of not implemented leading judgments. Austria, the Czech Republic, the United Kingdom, and Montenegro demonstrate the best indicators. In these countries, less than 10 % of the judgments of the ECtHR have not been implemented in 10 years that means that more than 90 % of the judgments have been implemented. EIN works with members and partners - lawyers, civil society organizations and communities - from across the Council of Europe, advocating the proper and timely implementation of the judgments of the ECtHR.

When referring to the obligation of public authorities to respond to the legal precedents of the ECtHR, reference should be made to the direct rules of the law "On the enforcement of judgments and the application of the case-law of the ECtHR", which by the implementation of the judgments of this institution by Ukraine means not only payment to the claimant and other individual measures in the case of loss, but also take some general measures (Drozdov, 2019).

Therefore, informing judges and executive officials of Ukraine about implementation of the judgments of the ECtHR does not contribute to the adaptability of our legislation to the legal standards of the Council of Europe reflected in the legal positions of the ECtHR. Despite the fact that national courts shall be guided by the judgments of the ECtHR choosing a preventive measure, the number of applications by Ukrainians is increasing every year. The ECtHR stated that violations of the Convention by Ukraine were systemic. Mostly, the provisions of the CPC regarding preventive measures, implemented through the prism of international standards, are declarative and have not come into force yet.

Although most of the novelties of the CPC of 2012 are the result of the findings of the ECtHR that occurred in the jurisprudence of the CPC of 1960, the current CPC did not fully address the problematic issues that existed in contemporary jurisprudence. This is evidenced by the judgment of the ECtHR in the case of *Chanyev v. Ukraine* of 09.01.2014, which found a violation of paragraph 1 of Article 5 of the Convention, since the complainant had been in detention for almost 2 months without a court decision, he had not been released by the public prison service and the prosecutor's office and the court had not responded to his unlawful detention. As we can see, applying of the preventive measure in the form of detention and respect for the right of a person to liberty and security of person is problematic in the practice of Ukraine. Among the preventive measures, this is considered to be the most violent, since the person is in fact limited in such fundamental rights as the right to liberty and security, freedom of movement, use, and disposal of his property.

In addition, violation of the right to liberty and security of person most often occurs when detaining a person and application of preventive measures. As the Constitutional Court of Ukraine noted in its judgment of 26.06.2003: the concept of "detention" should be understood as both a temporary preventive criminal procedural and administrative procedural measures, the application of which restricts the right to liberty and privacy of an individual (Judgment of the Constitutional Court of Ukraine, 2003). In its turn, the Supreme Court of Ukraine stated in the Plenum Resolution of 28 March 2008 No. 2, that restriction of the constitutional rights and freedoms of a person and a citizen during conducting investigative activities, inquiries and pre-trial investigation is allowed only by reasoned court judgment and are of exceptional and temporary nature (Resolution of the Plenum of the Supreme Court of Ukraine, 2008). Thus, there is a wide range of restrictions of this right, which most often occur in criminal proceedings, the cases of which have been stated in the judgments of the ECtHR against Ukraine.

Since the adoption of the current Criminal procedural code of Ukraine in 2012 (CPC), one of the legislative novelty is the requirements of Articles 8, 9 of the CPC, according to which the criminal procedural legislation of Ukraine is applied taking into account the case-law of the European Court of Human Rights, regarding the participation of a defense counsel, violation of which was pointed out by the Strasbourg Court. In this aspect it is worth supporting

O. G. Ianovska's (2013, p. 201) opinion that the participation of a lawyer in criminal proceedings is an important guarantee of the rights and legitimate interests of the persons whom he is authorized to protect and to whom he provides legal assistance, and is also a prerequisite for the implementation of the constitutional principle of parties' competitiveness.

Nowadays, legal regulation of ensuring the participation of the defense counsel in criminal proceedings is carried out both at the international and national level. On this issue, M. R. Arakelian's (2014, p. 147) opinion should be mentioned, who stated that the sphere of protection of human and citizen's rights and freedoms is radically changed, therefore it cannot be considered as an exclusive competence of national law. These days, both universal and international legal and regional legal standards have a significant impact on the establishing of national policy in this field. The idea of the rule of law, the priority of international law over the domestic, as well as the realization and protection of fundamental human rights and freedoms are the basis for the formation of the modern world order and modern international relations. It should also be added that European and international legal standards provide not only an effective establishment of national legislation in the relevant legal field, but also positively influence its further development and improvement. Undoubtedly, the formation of a legal mechanism of the right to be protected in criminal proceedings, the realization of which, first of all in the practical concerns, is carried out by the defense counsel, is no exception. Therefore, one should turn to the positive case-law of the ECHR, since at the international level it is empowered to hear the applicants' complaints about violations of the norms of the Convention by the national judicial and other bodies of the state parties, it directly concerns Ukraine.

Currently, there are blank spots in the practice of preventive measures regarding the prosecutors' reasoning of the presented risks, usually they simply list them in petitions and provide no confirmation that they will actually take place in the suspect's further actions, if his freedom is not restricted. However, it should be remembered that, in accordance with the requirements of the Convention, if the risk is not justified, restriction of human freedom is out of the question. Therefore, in deciding whether to apply a preventive measure against a person, national courts must proceed from the principle of the presumption of liberty. This principle means that

a person must remain at large until law enforcement officials prove the need to detain or keep him or her in custody. In order to prevent the arbitrary deprivation of liberty, national courts, when deciding whether to apply or continue the preventive measure, must motivate such a decision and give an assessment as to why it is impossible for a person to choose other, lighter preventive measures (Article 5 of the ECHR, Part 3 of Article 176 of the CPC of Ukraine, Part 5 of Article 199 of the CPC of Ukraine). According to the case-law of the court, improper reasoning for the decision to arrest a person is a violation of paragraph 3 of Article 5 of the ECHR. Thus, in the judgment "Gal v. Ukraine" of 16.04.2015, the ECtHR found a number of violations of Article 5 of the Convention, mainly due to the fact that the court's decisions regarding the complainant's detention or keeping in custody did not provide proper justification and a clear timeframe for the application of such measures, and did not provide for clear consideration of the need to take such measures, taking into account the individual circumstances of the complainant's case.

Everyone who has been the victim of arrest or detention in contravention of the provisions of Article 5 of the ECHR shall have an enforceable right to compensation. The right to compensation, established in Part 5 of Article 5 of the ECHR, occurs if a violation of one of the parts of Article 5 of the Convention shall be determined either by the appropriate national authority or by the Court. In the judgments "Soldatenko v. Ukraine" of 23 October 2008 and "Dubovik v. Ukraine" of 15 October 2009, the Court found the absence in Ukraine of effective remedies that would enable the victim to exercise his right to compensation for unlawful arrest.

We believe that the application of the case-law of the ECtHR in Ukraine, not as a declaratory provision but as an effective one, should be an important step. Nowadays, defense counsels often find violations of human rights and freedoms in criminal proceedings. This is the reason for appealing to the ECtHR, which in 90 % states violations of fundamental human rights and freedoms provided for in the ECHR. As a result, the state has a duty to pay the applicant considerable funds, which negatively affects the state budget and the image as a whole. Therefore, a judicial precedent should be introduced at the legislative level in Ukraine to limit the discretion of the court, and in many cases judicial arbitrariness. In fact, this should lead to the fact that in each case the deviation of the court decision from the position specified in

the precedent decision, the court decision should be reversed, and this is a significant leverage for the "unification" of court decisions. The problem is that the higher courts need to develop settled case law regarding all categories of cases in all types of court proceedings and also update it if necessary.

It should be noted that violations of human rights and freedoms by law enforcement and judicial authorities are the basis for the judgments of the ECtHR's in favor of the applicant, since, in accordance with paragraph 3 of Part 2 of Article 87 of the CPC of Ukraine the court is obliged to recognize a substantial violation of human rights and fundamental freedoms in case of violation of the person's right to protection. Thus, it should be remembered that Article 13 of the Convention guarantees everyone whose rights and freedoms are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Thus, even in spite of the complexity of the issue, the norms of international legal acts mostly enshrine the fundamental principles of protection of the rights, freedoms and legitimate interests of the individual. However, there is no comprehensive legal act to ensure the right of defense. In this connection, let us agree with Ya. M. Zhukorska's (2014, p. 241) opinion, who stated that at the international level it is necessary to elaborate upon the provisions regarding the activity of the bar, to give them a form of multilateral convention, which could become a kind of harmonization of the rules of national legislation in this field.

Nowadays, the issue outlined above becomes aggravated, as the ECtHR finds systematic rejection and non-enforcement of decisions, including the provision of a defense counsel in criminal proceedings. This is confirmed by J. P. Kosta's (2011, p. 13) position, who noted that the decision of the ECtHR urged the respondent state to introduce an effective legal mechanism to help rectify the situation and ensure that applications that are pending or will be submitted in the future are duly considered at the national level. So, in order to overcome such a negative situation, according to V. Svyatotska (2011, p. 112), it is necessary to change the attitude to ensuring human rights in Ukraine through the prism of the Convention for the Protection of Human Rights and Fundamental Freedoms, and also change and improve the level of legal culture. And this, in turn, can be achieved

by overcoming the basic problems of respect for human rights.

Thus, it can be noted that, despite the positive changes in the current criminal procedural legislation of Ukraine, today the national courts very rarely use and refer to the relevant provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms and the decisions of the European Court of Human Rights.

## Conclusions

Summarizing the study, we can draw several general conclusions. Firstly, in the modern world, international cooperation of states in the field of protecting the rights, freedoms and legitimate interests of man and citizen is rapidly developing both internationally and regionally. Secondly, in a fairly short period of time, the international community has managed to achieve certain positive results in the protection of human rights and freedoms. However, today there are questions that have not been resolved positively, which leads to the advancement of tasks for their in-depth theoretical research with the aim of further developing and formulating proposals for the implementation into national legislation and their improvement. Thirdly, despite the improvement of the criminal procedural legislation of Ukraine on the issues investigated, in practice, the assumption of violations of the right to defense continues, in connection with which the suspect, the accused are deprived of the opportunity to assert their rights, freedoms and legitimate interests. This further leads to the appeal of individuals to the ECtHR, which in 90% of cases finds a violation by the national law enforcement and judicial authorities of the fundamental rights and freedoms enshrined in the ECHR.

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