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The role of the constitution in the system of human rights protection in the context of European integration of Ukraine

***Abstract.** This paper deals with the current state of human rights in Ukraine in the context of European integration. Some historical aspects that influenced the formation of a common system of human and citizen rights are considered mostly through the scope of constitutional process in Ukraine. The practice of the European Court of Human Rights concerning Ukraine has been analyzed as well as the newest set of constitutional amendments draft aimed at the expansion and specification of human rights in the Constitution of Ukraine. Based on this information, conclusions were drawn on the justification for the existence of a significant number of applications against Ukraine and the low level of payments in accordance with the decisions of the ECHR. A number of issues have been identified in need to be resolved in the process of future accession to the European Union. A line was drawn between the constitutional recognition of human rights and freedoms and the functioning of actual mechanisms for the protection of such rights in our country. It is also noted that the difference in the understanding of human rights by different generations of Ukrainians often negatively affects the overall state of things in this area, mostly because the Soviet*

legacy reflected in «the man for the state» ideology still prevails over «the state for the man» doctrine in modern world.

Keywords: *human and civil rights and freedoms, constitutional process in Ukraine, ECHR, European integration, European Union, Ukraine.*

The history of European integration of independent Ukraine extends back more than 20 years. Despite the fact that at various stages of our state development this process was characterized by different dynamics, the direct vector of development always remained the same aimed at construction of autonomy, international and European integration, creation of the market-driven economy and a stable and capable civil society. The Revolution of Dignity removed once and for all possible doubts associated with Ukraine belonging to the European civilization and gave an adequate incentive to accelerate the above processes. Human rights as a phenomenon are inseparable from the state; they accompany and reflect all the processes that occur in it.

One of the most critical issues in the domestic human rights sphere at the time of the Soviet Union collapse was the necessity to refuse from the old system where nationwide approach to regulation of the human rights was limited to perception of the rights as an instrument provided to certain groups of citizens to ensure and maintain the state order and execute the state policy. For example, Art. 1 of the Constitution of the USSR, 1978, states that «The Ukrainian Soviet Socialist Republic is a socialist state of the whole people which expresses the will and interests of the workers, peasants and intellectuals, industrial classes of the Republic of all nationalities» [1]. Ignoring the recognition of the human rights, health and survival, honor and dignity, integrity and security as the highest social value clearly illustrates the imperfection and falsity of the chosen approach to secure the rights. Despite the fact that Ch. 5 and 6 of above document set a particular list of rights of a Soviet citizen, and Art. 55 guaranteed the formal respect by public authorities of such rights and possibility of judicial protection, this list was exceptional, insignificant in scope and actually duplicated the relevant provisions of the Constitution of the USSR.

The major step along with recognition of the relevant provisions in the Constitution of Ukraine, 1996, was ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, the Convention) by our state on 17.07.1997 [2]. By accepting the mandatory provisions of the Convention, Ukraine accepted the jurisdiction of the European Court of Human Rights (hereinafter, the ECHR) and other bodies which this way or another refer to the European mechanism for the human rights protection, the PACE, the Committee of Ministers and the Commissioner for Human Rights of the Council of Europe.

Recognition of the list of rights at the international level and participation in the mechanism operation for their assurance certainly has positively affected development of the domestic system of human rights. A significant number of provisions (means of a general nature) [3] established in the decisions of the ECHR were implemented to some extent in the legislation of Ukraine in order to prevent the further occurrence of situations dictating the need to address this body. In addition, the mere existence of such a body of the «fourth instance» which bases its operation on the principles of subsidiarity and discretion of the state [4] positively affects the situation around human rights in any state.

One of the most modern developments in the sphere of constitutional consolidation of human and civil rights and provision of mechanisms for their implementation was the draft of Section II of the Constitution prepared by the Working Group on the Rights, Freedoms and Duties of the Man and the Citizen, as of July 15, 2015. This working group consisting of leading experts in the field of state building, human rights, international, civil and criminal law prepared a detailed draft of amendments to Section II based on the provisions of major international human rights instruments and the practice of the European Court of Human Rights, as follows:

- 1) Discover the notion of human dignity and expand the state duties associated with its respect and protection;
- 2) Totally deny the possibility of conviction to the capital punishment within the framework of the vested right to life,

3) Specify the provisions on prohibition of torture and assure the concepts of «physical and spiritual integrity»;

4) Implement the standards of international conventions on prohibition of slavery and forced labor, human trafficking;

5) Improve the provisions associated with realization of the right to freedom and personal inviolability by reducing the maximum period of detention to forty-eight hours and securing the state compulsory compensation for moral and material harm to the detainee contrary to the provisions of Article 29 of the Constitution (Article 26 of the draft);

6) Recognize a wide range of children's rights: the right to protection and care, free expression of views, direct contact with both parents and the like;

7) Polish the provisions on freedom of thought, conscience and religion, as well as freedom of speech, prohibition of discrimination and many others;

Unfortunately, currently the provisions of the mentioned project have not been implemented. One of the main reasons why implementation of these amendments was delayed is as a complex domestic and international political, economic and social situation of our state which cannot contribute to complete realization of even recognized rules. Official statistics by the ECHR clearly reflects negative trends in recent years in our country. Despite the fact that the overall statistics on court decisions for the whole period of the mechanism existence (1959–2016) [5] allows estimating the position of Ukraine as negative, but not critical. The latest information on the number of unexamined applications is actually shocking; there are more than 18,000 unexamined claims against Ukraine as of 31 December 2016, representing 22.8 percent of all unexamined applications of the ECHR.

These dynamics is primarily explained by the following range of factors:

1) Annexation of the Autonomous Republic of Crimea by the Russian Federation, and as a result, inability of our state to ensure human and civil rights in the lost territories. This situation directly concerns the Russian Federation as a country that currently has its sovereignty over the mentioned territory. This fact includes not only

a case of Ukraine against Russia and the decision of the ECHR regarding Russia deterrence against any military action in regard to citizens of Ukraine in its territory [6], but also a number of cases on human rights violations against Russia and/or Ukraine;

2) Existence of a longstanding military conflict in the territory of Donetsk and Lugansk regions and its destabilizing influence on our state. Starting from the peculiarities of the territorial jurisdiction of the ECHR and taking into account the qualifications of Ukraine in regard to this conflict, it is easy to explain a fairly large number of applications against our state in this conflict. It is useful to remember all human rights violations that arise around this situation and those that are directly related to the rights of internally displaced persons. In addition, despite attempts to not participate in political discourses, the ECHR nevertheless took part in the solution of the case «Savchenko v. Russia» (50171/14) [7]. The situation is also complicated by a significant number of prisoners of war, as the rights of servicemen are guaranteed not only by the Constitution of Ukraine, but also by a number of international legal instruments;

3) Social, political and economic difficulties in the implementation of the recent reforms and directly related massive violations of the rights and freedoms enshrined in the Convention. This fact is not less significant in its scope. It can include, for example, the violations related to the so-called «lustration». At the end of 2016, the ECHR accepted the application of Protsenko I. O. [8] against Ukraine regarding the unlawfulness of his dismissal from the office in accordance with the Law of Ukraine «On Purification of the Power» of 16.09.2014. [9] The very fact of the application adoption allows us to assert that the provision of this Law may not fully correspond to the list of rights established by the Convention. It is not difficult to predict the growth in the number of such applications in the future and possible negative consequences for Ukraine.

Thus, an independent expert at the Ukrainian Helsinki Union, S. Kulitska, points out that «...the effect of one of the fundamental criteria for the success of any reform is significantly leveled, its value basis and the boundaries of implementation, which, in its turn,

affects the level of its effectiveness». In addition, the expert concludes that, despite some progress, the complex judicial, anti-corruption and law enforcement reforms in our country have not yet been properly implemented. This conclusion can be supported by the ECHR statistics for 2016 according to which among 73 decisions of the ECHR in Ukraine, 83 cases reveal violation of Articles 3.6 and 13 of the Convention (prohibition of torture, the right to a fair trial and the right to an effective remedy, respectively). One can support the thesis of the expert that any reforms in the state should be carried out in accordance with the provisions of the National Strategy for Human Rights [10].

It is also necessary to pay special attention to the problem of paying compensation to Ukraine under the decisions of the European Court of Human Rights. According to the ECHR report, in 2016 our state made timely payments in 20 cases, in 16 more cases payments were made after expiration of the allotted time. As of the end of 2016, there are no payments in 213 cases, in 166 cases the delay in payment exceeded six months. However, Ukraine still demonstrates an understanding of the need to ensure payment, as evidenced by the case of Agrocomplex v. Ukraine (Application No. 23465/03) [11]. This example illustrates that the payment of compensation to Ukraine is often understood as the actual financial responsibility of the Ukrainian people for imperfections, corruption and administrative dependence of national courts, which, given the amount of compensation, is unacceptable for a modern independent democratic state.

Considering this information in the context of Ukraine desire to join the European Union, it is possible to single out a range of problems.

Firstly, the existing situation in the state around human rights prevents our state from corresponding to the political part of the so-called Copenhagen criteria [12] (criteria for accession to the EU), and namely, the principles of democracy (inability to participate in political processes for HPE), the principles of the rule of law (problems with «lustration»); and, directly, human rights guaranteed by the Constitution and laws of Ukraine and ratified international treaties are

violated. As it has been already noted in this material, human rights are closely intertwined in all elements of the systems of a democratic state. All problems and problems that arise in a statesomeway affect the population living on its territory.

Secondly, there is a number of «latent» criteria for accession to the EU most of which in significant amounts are related to ensuring the principle of respect for human rights. Among them, the absence of territorial disputes and internal conflicts in the territory of the candidate state and the need to adopt the Statute of the International Criminal Court that will become possible in 2019 when the changes to the Constitution of Ukraine enter into force. Therefore, it is necessary to find in the shortest possible time any methods to effectively and peacefully resolve territorial disputes and settle the conflict in the Donbass region, because these factors will directly exclude the further movement of our state towards integration into the EU. This, in its turn, gives the Russian Federation certain levers of influence which must be eliminated.

Thirdly, the process of adaptation and harmonization of national legislation with the EU legislation (and implementation of the *acquis communautaire*) may cause certain warnings about the impact of such adaptation on certain human and civil rights. It is obvious that EU legislation is primarily aimed at improving the living standards of its citizens. However, despite this fact, it is necessary to understand that Ukraine economically, socially and politically may not be able to ensure some provisions; therefore, it is worth paying special attention to observance of human rights when implementing EU law norms. Such comprehensive and cardinal reforms in any state always lead to violation of the rights of certain population groups in one way or another. So, the state should take on additional responsibilities to monitor and enforce the rights of these groups.

It is worth adding that the prospect of joining the European Union also includes the need for mandatory accession to the Charter of the Fundamental Rights of the European Union (hereinafter, the Charter) that since the entry into force of the Lisbon Treaty has

become equivalent to the EU constituent treaties. According to Article 51, Paragraph 1 of the Charter, «the provisions of the Charter are addressed to the institutions and bodies of the European Union subject to the principle of subsidiarity, as well as to the member countries exclusively in cases where they apply the law of the European Union». [13] Therefore, in spite of a rather narrow scope of this instrument, it should be noted that it contains a much more «modern» and broad list of rights protected. It is clear that most such rights will arise only when the state implements EU law norms, and taking into account the uncertainty, the issue of Ukraine integration into the EU it is not a priority. Despite this, it is necessary to postpone consideration of this issue, since the system of the EU law sources is holistic, and the role of this document in it is one that cannot be ignored.

Summing up, one should address a somewhat general question about civil society in Ukraine and its connection with the understanding of human rights by different Ukrainian generations. In my opinion, nowadays there is a rather significant gap in the understanding of human rights between generations in our state. The positions of many Ukrainians formed under the influence of the Soviet Union ideology, were successfully characterized by Kolodiy A. M. as «Slavic stoicism». Prevalence of «the man for the state» ideology over «the state for the man» ideology exercised a significant influence on the current situation around human rights in independent Ukraine, and therefore such an ideology should be immediately rejected.

Nowadays our country continues to experience a tendency of separation of the constitutional and legislative regulation of human rights from their practical provision and protection. The list, essence and detail of rights are expanded and the mechanisms for their implementation by the state only lose effectiveness, as evidenced by the work of the European Court of Human Rights. The unstable economic and political situation reinforces these negative trends. It is necessary to understand that the implementation of the criteria for accession to the European Union must be inseparable. It is impossible to enforce one criterion implementation by neglecting the

other because they are interrelated. The implementation of the state policy on European integration of Ukraine should be a step-by-step controlled process. Otherwise, the negative impact of the European integration processes on our state may exceed the positive one.

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О. О. Петришин

**Роль Конституції в системі захисту прав людини
в контексті євроінтеграції України**

У статті розглянуто поточний стан у сфері прав людини в Україні в контексті європейської інтеграції. Деякі історичні аспекти, які вплинули на формування загальної системи прав людини і громадянина розглядаються здебільшого через сферу конституційного процесу в Україні. Проаналізовано практику Європейського суду з прав людини щодо України, а також найбільш сучасні проекти внесення змін, спрямовані на розширення і уточнення прав людини в Конституції України. На основі аналізу вказаних даних обґрунтовано існування значного числа заяв проти України і низький рівень платежів відповідно до рішень Європейського суду з прав людини. Виокремлено ряд питань, що потребують першочергового вирішення для забезпечення вступу України в Європейський Союз. Розглянуто проблему розриву між конституційним визнанням прав і свобод людини і функціонуванням реальних механізмів захисту таких прав у нашій країні. Обґрунтовано думку про те, що відмінність у розумінні прав людини різними поколіннями українців часто негативно впливає на загальний стан справ у цій галузі, в основному тому, що радянська спадщина, відображена в ідеології «людини для держави» досі преважує над ідеологією «держави для людини».

Ключові слова: права і свободи людини і громадянина, конституційний процес в Україні, ЄСПЛ, євроінтеграція, Європейський Союз, Україна.

О. А. Петришин

**Роль Конституции в системе защиты прав человека
в контексте евроинтеграции Украины**

В статье рассмотрено текущее состояние прав человека в Украине в контексте европейской интеграции. Некоторые исторические аспекты, которые повлияли на формирование общей системы прав человека и гражданина рассматриваются в основном через сферу конституционного процесса в Украине. Проанализирована практика Европейского суда по правам

человека по Украине, а также наиболее современные проекты внесения изменений, направленные на расширение и уточнение прав человека в Конституции Украины. На основании проведенного анализа указанных данных обосновано наличие значительного количества заявлений против Украины и низкого уровня выплат в соответствии с решениями Европейского суда по правам человека. Выделен ряд вопросов, требующих безотлагательного решения для обеспечения вступления Украины в Европейский Союз. Рассмотрена проблема «разрыва» между конституционным признанием прав и свобод человека и функционированием реальных механизмов защиты таких прав в нашей стране. Обосновано мнение о том, что различие в понимании прав человека разными поколениями украинцев часто негативно влияет на общее положение дел в этой области, в основном потому, что советское наследие, отраженное в идеологии «человека для государства» до сих пор превалирует над идеологией «государство для человека».

Ключевые слова: права и свободы человека и гражданина, конституционный процесс в Украине, ЕСПЧ, евроинтеграция, Европейский Союз, Украина.