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SUBJECT OF DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS

This article analyzes the powers of the European Court of Human Rights and determines the limits of such powers, proposes additional grounds of appeal to the Court, compares decisions of the ECtHR and the Constitutional Court of Ukraine and highlights importance of the ECtHR's decisions for legal system of Ukraine.

The author analyzes scientific hypotheses about the limits of the ECtHR's powers. Particular attention is paid to the fact that legal order of the Council of Europe developed a trend for universalization of human rights institute. The author emphasizes that because of the binding character of the ECtHR judgments for states and their bodies, protection of citizens' rights in this Court should be considered as exceptional, but not the usual way of restoration of rights.

Considering information analyzed in the article we may assert that the grounds to apply to the ECtHR and, accordingly, the subject of its consideration may be:

- inconsistency of Ukrainian legislation with high European standards of safety and protection of rights of citizens and legal entities, resulting in violation of mentioned rights;
- inability to protect and restore the rights of citizens in a state, which can be manifested not only in court decisions violating substantive and procedural law, but also in delay of proceedings, non-enforcement of court decisions by state executive service;
- dissatisfaction of citizens with the means of elimination of violations and / or restoration of rights defined by a domestic court, including the lack of adequate compensation for a violated right.

Considering the powers of the Constitutional Court of Ukraine as the sole legitimate authority on interpretation of constitutionality of laws and other legal issues, the author concludes that the powers of the Constitutional Court of Ukraine are higher than those of the European Court of Human Rights, unless, of course, we recognize the Constitution of Ukraine as the highest legal act in the hierarchy of laws in Ukraine. It is therefore possible to recognize the authority of the Constitutional Court of Ukraine to review the decisions of the ECtHR for their constitutionality for Ukraine.

Key words: the European Court of Human Rights, decision, subject, the Constitutional Court of Ukraine, precedent.

For a correct understanding of the limits of powers of the European Court of Human Rights (hereinafter – ECtHR) we should outline the issues that can be applied to the Court and, accordingly, reflected in its decision. This approach to understanding of ECtHR judgments will allow rethinking the questions which can be applied to this Court by a person, and also to predict the limits of the Court's decisions and bring these decisions to final execution.

In this regard, we'll analyze scientific hypotheses about the limits of powers of this Court. Thus, S. Dobrianskyi pointed out that legal order of the Council of Europe developed a trend for universalization of human rights institute, which is manifested particularly in the adoption in 2000 of Protocol №12 to the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (European Convention). Thus, the scope of effective international judicial protection by the ECtHR included not only civil and political rights (and, exceptionally, certain socio-economic rights) fixed by the European Convention, as it was before, but also all other categories of human rights that were fixed in national legislation of the Council of Europe member-states which ratified the mentioned Protocol. The latter was intended to ensure on the basis of equality all relevant human rights to entities under the jurisdiction of a relevant state, taking

as a basis the meaning and scope of a certain right, determined by the nature and level of development of a given society[1].

It should be noted that S. Dobrianskyi outlines the limits of powers of the ECtHR as general on the basis of equality and, ultimately, they suggest protection according to the level of "development of a given society". It is difficult to agree with this statement of S. Dobrianskyi, because there is a contradiction, as far as defining European standards on human rights and fundamental freedoms as a general course on universalization, such standards should be applied to citizens of all Eurozone countries.

Indeed, economic standards of living in Europe can not be the same for all citizens, but all citizens should be provided with at least minimum economic, social and other conditions for living. Otherwise, the UN Charter, the Universal Declaration of Human Rights, the Constitution of Ukraine, where a person's life, health, security and safety are recognized as the highest social value, and the rights, freedoms and their guarantees determine the content and direction of the state (Art. 3), will turn to a simple declaration, but not the norms of direct effect.

Other authors consider decisions of the ECtHR as precedents and compare them with British legal system, something difficult to accept because through court decisions British system of justice fills in gaps in law[2], and the ECtHR makes expanded interpretation of international legal acts and their provisions, thus expanding the scope of these rules and defines new rules for member states of the Council of Europe in dealing with its citizens. In particular, M. Mazur titles the third chapter of his thesis: "Precedents of the European Court of Human rights as a source of constitutional law of Ukraine" and reveals the concept of a precedent in the context of the ECtHR's decisions, which consistently follows case-law principles and constantly refers its previous decisions, precedents of the European Commission on human rights or "existing case law"[3].But thus the ECtHR confirms consistency of its own position, but does not accept its decisions as immutable rules or precedents that dictate completely new and obligatory rules and so on. That is why art. 30 of the European Convention on Human Rights states: "if the issue which it considers may result in incompatibility with the decision rendered by the Court earlier, the Chamber may at any time before it has rendered its judgment relinquish jurisdiction to the Grand Chamber, unless one of the parties does not object"[4]. Scilicet, accepted decision can not be regarded as final and shall be reviewed by not even a Grand Chamber if the parties insist.

There are concepts in Ukraine under which the activities of the ECtHR is considered along with other methods of protection[5], although this position is not entirely justified, since it diminish the status of the Court as the exclusive one, which activities begin when all legal means of protection in the country have been exhausted. Because of the binding character of the ECtHR judgments for states and their bodies, protection of citizens' rights in this Court should be considered as exceptional, but not the usual way of restoration of rights..

Therefore it is obvious that the subject of the ECtHR's decisions should be formed considering previously mentioned provisions and position of the court. In particular, the ECtHR decision in the case "Novoseletskyi vs. Ukraine" (Application N 47148/99) Strasbourg, February 22, 2005 stated that "... the Court reiterates that it has no right to replace national authorities to determine a proper behavior of the institution in the case"[6]. At the same time, the reasoning and the operative part of that decision ascertained existence of violations of the Article 8 of the European Convention[7] and the Article 1 of the Protocol

[1] Добрянський, С.П. (2003). *Актуальні проблеми загальної теорії прав людини*: автореф. дис. на здобуття наук. ступеня канд. юрид. наук: спец. 12.00.01. «теорія та історія держави і права; історія політичних і правових учень». Одеса.

[2] Малишев Б.В. (2008). *Судовий прецедент у правовій системі Англії*. Київ: видавничий дім «Праксіс», 344.

[3] Мазур, М.В. (2009). *Акти органів судової влади як джерело конституційного права України*: автореф. дис. на здобуття наук. ступеня канд. юрид. наук: спец. 12.00.02. «конституційне право; муніципальне право». Харків.

[4] Конвенція про захист прав людини і основоположни свобод. *Офіційний веб-сайт Верховної Ради України*. <http://zakon4.rada.gov.ua/laws/show/995_004>.

[5] Спасибо-Фатеева, И.В., Сибилев, М.Н., Яроцкий, В.Л. (2014). *Харьковская цивилистическая школа защита субъективных гражданских прав и интересов*. Харьков, 672.

[6] Європейський суд з прав людини. Друга секція. Рішення «Новоселецький проти України" (заява N 47148/99). *Офіційний веб-сайт Верховної Ради України.* <http://zakon4.rada.gov.ua/laws/show/980_238>

[7] Конвенція про захист прав людини і основоположни свобод. *Офіційний веб-сайт Верховної Ради України*. <http://zakon4.rada.gov.ua/laws/show/995_004>.

№1[1], and in fact, the lack of respect for private and family life, dwelling and deprivation property of the applicant. The author deliberately identified insufficient attention of the public authorities and therefore the judiciary in Ukraine to the previously listed issues, but not quoted literal meaning of the Article 8 of the Convention, as far as claims of the applicant was partly satisfied by that decision.

Ukrainian courts in this case referred to impossibility of reimbursement of moral damage caused in residential relationship because it is not provided by the legislation of Ukraine, and the European Court of Human Rights did not support this position and established not only the fact of moral damages to the applicant, but also the level of responsibility of officials for damages, putting the obligation on Ukraine to compensate the damage. The author agrees with this position, since absence of direct references in the housing legislation on the possibility or impossibility of moral damages should not be considered by the courts, because moral damage is a subjective perception of certain circumstances and therefore the level of mental suffering will be different for every person. Moreover, the art. 23 of the Civil Code of Ukraine associates legal grounds for moral damages with the fact of offense and this formula of moral damages should be applied to all relationships.

Otherwise, the specific level of moral damage must be set in legislation for different legal relationships, although such attempts are also being made, particularly for moral damage in road accidents[2], but any formulas are not able to take into account subjective factors, such as personification of a victim and a perpetrator.

The author believes that the provision on protecting the rights considering an offender can be viewed through the hypothesis of moral damage and rational compensation requirements from the specific subject; namely in the case of public resentment of a homeless person is unlikely someone will turn to him / her with the suit because legal futility of such case is obvious. At the same time when resentment goes from actions or words of officials or millionaires, then the responsibility should be appropriate to their status and so on.

The author was and still is a supporter of the previous version of part 2, Art. 440-1 of the 1963 Civil Code of Ukraine, where the minimum size for moral damage was fixed, namely no less than five minimum wages, and considers it appropriate to introduce it again in the civil law of Ukraine. But this does not mean that the same amount of moral damage should be fixed, but its minimum size established by law will give a benchmark for reasonable increase of its size by a particular subject. Moreover, the courts will have to follow the law, but not to convert this amount of moral damages to miserable, as it takes place today.

As for unreasonable increase of the amount of moral damage, a limiting factor there is the progressive scale of court fee, that must be paid before going to court and this should warn unreasonable desire to get the most benefit because the courts do not always satisfy claims for moral damages, especially in full. The best in modern terms we consider the amount of the minimum moral damage is one minimum wage.

Therefore, we consider appropriate to introduce an increased rate of minimum size for moral damage caused by a state, i.e. its officials, to at least two minimum wages. In this case, one minimum wage should be levied directly from the authorized representative of a state, whose acts or omissions had caused the damage, and the second minimum wage from an organization where this official works. Such differentiation is needed in modern conditions due to the fact that much of state officials allow themselves to neglect their responsibilities and to abuse official rights, because they do not bear significant personalized financial responsibility; a state is responsible for their actions or omissions. Similarly, but to a much greater extent a state is responsible for offenses, when by the ECHR's decision citizens of Ukraine are awarded compensation from the state, but for these facts the representatives who have committed offenses should bear responsibility. That's why judges approve illegal (unjustified) decision without hesitating, because they are not financially responsible for consequences of damage caused to individuals involved in a case.

Considering information analyzed in the article we may assert that the grounds to apply to the ECtHR and, accordingly, the subject of its consideration may be:

- inconsistency of Ukrainian legislation with high European standards of safety and protection of rights of citizens and legal entities, resulting in violation of mentioned rights;

[1] Протокол до Конвенції про захист прав людини і основоположних свобод. *Офіційний веб-сайт Верховної Ради України*. <http://zakon4.rada.gov.ua/laws/show/994_535>

[2] Слонова, Е. (2008). Расчет «душевных страданий» при ДТП. *Юридическая практика, 33*. <yurpractika.com/article.php?id=100095219>.

- inability to protect and restore the rights of citizens in a state, which can be manifested not only in court decisions violating substantive and procedural law, but also in delay of proceedings, non-enforcement of court decisions by state executive service;

- dissatisfaction of citizens with the means of elimination of violations and / or restoration of rights defined by a domestic court, including the lack of adequate compensation for a violated right.

But it should be noted that this division of grounds for applying to the ECtHR is generalized. If to specify current state of legal protection of citizens, it becomes apparent that applying to the ECtHR is possible as before a final decision by the courts Ukraine so after it.

Ukrainian judicial practice had cases when proceedings lasted more than five years. For various reasons individuals were deprived of the right to judicial protection by refusing to accept statement of claim, pointing its different shortcomings and returning claims[1], refused to satisfy disqualification of a judge. This bias was evident, as judges groundlessly refused to satisfy different applications, incompetently decided procedural questions, and so on. Therefore we think that individuals may apply to the ECtHR when the case was not resolved in Ukraine, but all reasonable terms for its consideration have already expired (Art. 6 of the Convention) [2].

The author is confident that many of the Ukrainian citizens appealed to the Constitutional Court of Ukraine and remained with unsatisfied refusal to consider their application. The latter situation is not generally considered to be legal, as far as instead of judges of the Constitutional Court a response to a procedural request is given in a form of a simple letter by court chancellery, which is not a part to judicial relations and can not assume the power to resolve legal issues. In our opinion, the citizens of Ukraine have the right to appeal to the ECtHR to protect their rights when they are hindered access to justice, although this position is debatable.

Moreover, some authors turned to analysis of this problematic issue and noted that "In determining exposure limits of ECtHR precedents for practice the Constitutional Court of Ukraine must proceed from the specific legal nature of the latter as the sole body of constitutional jurisdiction, so these precedents have not obligatory, but convincing character. In addition, the analysis of several cases resolved by ECtHR and the CCU proved that the CCU considering legal issues not always can make a general conclusion on unconstitutionality of a certain law, even using ECtHR's precedent which takes into account the facts of a particular case"[3].

Weighing the powers of the Constitutional Court of Ukraine as the sole legitimate authority on interpretation of constitutionality of laws and other legal issues, we must admit that its authority is higher than of the European Court of Human Rights, unless, of course, we recognize the Constitution of Ukraine as the highest legal act in the hierarchy of laws in Ukraine. It is therefore possible to recognize the authority of the Constitutional Court of Ukraine to review the decisions of the ECtHR for constitutionality for Ukraine.

On the other hand, due to the fact that the European Court of Human Rights is a supranational body in the European Union we should agree with its power to review even decisions of constitutional courts of member states of the Council of Europe and, accordingly, of the Constitutional Court of Ukraine if it has violated European human rights standards. But the legitimacy of such decisions is questionable in Ukraine because of the high status of the Constitutional Court of Ukraine.

Analyzing decisions of the Constitutional Court of Ukraine without considering its status, the society has already recognized some of them as such taken under political influence. Therefore, we consider it impossible to absolutize the position even of this court. Indisputable is the fact that not all ECtHR's decisions are absolutely correct and corresponding to real legal relationships, so you should not idealize these decisions to.

Consequently, there is a potential for jurisdictional conflict between the ECtHR decisions and decisions of the Constitutional Court of Ukraine in terms of perception of a particular case and in this

[1] Фурса, С.Я, Фурса, Є.І. (2011). Аналіз типових зауважень, які пред'являються судами при прийняті заяв. *Процесуальні документи: теорія, методика і практика*. Київ: видавничий дім «Правова єдність», 69-75.

[2] Конвенція про захист прав людини і основоположни свобод. *Офіційний веб-сайт Верховної Ради України*. <http://zakon4.rada.gov.ua/laws/show/995_004>.

[3] Мазур, М.В. (2009). *Акти органів судової влади як джерело конституційного права України*: автореф. дис. на здобуття наук. ступеня канд. юрид. наук: спец. 12.00.02. «конституційне право; муніципальне право». Харків.

situation the necessity will appear to recognize benefits of one of the courts. In this situation, in our opinion, should be mentioned that the Constitutional Court of Ukraine is limited in its powers concerning free perception of rights and obligations of legal entities, because it is dominated by the letter of law, and the ECtHR in its decisions can promote spirit of law and legislation.

Therefore, we can and should raise the issue about dominance of European standards of legal perception over national; this, in fact, will reduce legal significance of the Constitutional Court of Ukraine, and Ukraine's legal system in general. Such situation will also indicate a partial loss of sovereignty and independence of Ukraine (Art. 1 of the Constitution of Ukraine), although recognizing the authority of the European Court of Human Rights as binding for Ukraine, we should recognize such state de facto.

But, objectively, the best option is when citizens of Ukraine apply to the European Court of Human Rights for protection of their rights if they do not find it in Ukraine. At the same time, we should raise to European standards the requirements for enforcement and protection of human rights by Ukrainian courts and on this basis to improve legal system of Ukraine.

The author believes that current legal discourse concerning legal value of decisions of the Constitutional Court of Ukraine[1] should be resolved in favor of providing this court with powers similar to the European Court of Human Rights. Therefore, the Constitutional Court of Ukraine should have not formal (literal) powers for interpretation of unconstitutionality of legal acts or for official interpretation[2]; its powers should spread to resolving issues on compliance of Ukrainian legal acts to European standards in the context of regulation of the rights of citizens and legal persons.

Indeed, today we can agree with B. Malyshev, who pointed out immaturity of democratic institutions in Ukraine (especially meaning weak formation of democratic standards and traditions in functioning of the Verkhovna Rada of Ukraine and President of Ukraine; powers of official interpretation should belong to the Constitutional Court of Ukraine...." [3]. And, however, expanding the powers of the Constitutional court of Ukraine, despite the expressed concerns in its activities, a big part of potential appeals to the European court of human rights may be decided in Ukraine. However, it is expedient to revise the composition of the Constitutional court of Ukraine, as this issue has political engagement in terms of restraining factors and balances that aimed to provide equal influence in the struggle for power between parliament and president. Mistakes of this approach to formation of the Constitutional Court of Ukraine was discovered later and confirmed by the actual revision of the Constitution of Ukraine during V. Yanukovych presidency and his usurpation of all power.

The author believes that powers of the Constitutional Court of Ukraine to review the issue of compliance of human rights protection in Ukraine to European standards will increase demands of society to actions of authorized state officials. In this case, we mean the possibility to sue the state, which according to Art. 30 of the Civil Procedural Code is a subject to civil procedural relationships in various offenses, including implementation of laws that do not meet any constitutional provisions or European standards, not to mention failure to fulfill the requirements of laws due to lack of funds in the budget and so on.

Problems that occur in modern legal system in Ukraine are also caused by the fact that much of legislative bills and existing laws being tested for their compliance with the European standards in the Venice Commission, but for a self-sufficient legal state such issues should be settled within the country, not with the help of foreign experts. In particular, Ukraine has research institutions, the Academy of Sciences, the Academy of Legal Sciences, composed of leading Ukrainian scientists, whose legal position, experience and professionalism are ignored. That's why the author believes that an appeal to the ECtHR and other international legal institutions should be seen only as a fallback; we should not make a fetish of these institutions and provide them with controlling legal role in Ukraine, and this situation should stimulate our authorities to improving legal system of Ukraine taking into account our historical and political experience and mentality of the Ukrainian people.

[1] Малишев, Б.В. (2008). *Судовий прецедент у правовій системі Англії.* Київ: видавничий дім «Праксіс», 275-294.

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[3] Малишев, Б.В. (2008). *Судовий прецедент у правовій системі Англії.* Київ: видавничий дім «Праксіс», 284.

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