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Constitutional Concept of Human Rights in Ukraine

1. Incorporation of the International Law on Human Rights in the national law of Ukraine

The Constitution of Ukraine pertains to the new generation of Constitutions. It was adopted in 1996 [1]. As a whole the constitutional system of Ukraine may be characterized as an open one since it forms the bases for the inclusion of the norms of international law into the internal legal order. International agreements are considered as a source of constitutional law. These are the agreements concerning the subject matter of the constitutional regulation including primarily the protection of human rights, issues of citizenship, refugees, national minorities, local self government etc. [2] The open character of the Constitution of Ukrainian allowed the inclusion into the internal legal order of the country the provisions of the UN Charter, the UN Pacts on Human Rights of 1966, the European Convention on Human Rights of 1950 and some other basic agreements on human rights to which Ukraine is a party [3]. Needles to say that the constitutional provisions on human rights reflect at large the provisions of these international instruments.

The incorporation of the provisions of international conventions on human rights is done on the basis of the art. 9 of the Constitution. It states that international treaties currently in effect and approved by the Supreme Council of Ukraine as binding on the country shall be part of Ukraine's national legislation. The Law of Ukraine on

International treaties of 2004 includes the provision on the primacy of the norms in case of a conflict with the norms of internal legislation (art. 19) [4]. The wording of the provisions of art. 9 of the Constitution and of art. 19 of the Law on International treaties provide for so-called “situational primacy” of international law over the internal law in Ukraine [5]. Sometimes it is called “exclusivity rule” [6]. “Situational primacy” or “exclusivity rule” mean that the provisions of international agreements upon their ratification form an integral part of the internal legislation, they prevail over internal legal acts, but for the Constitution, only in case of their conflict with the provisions of a particular international agreement. If there is no conflict both international and internal rules that regulate the same relations are valid and have to be conformed. The Constitution does not contain any provision on the primacy of international as a whole over the internal legislation. The clause on the priority of international treaties over the rules of the internal laws may serve as a guarantee for the fulfillment by Ukraine of its international obligations [7].

One should also bear in mind that an international agreement to which Ukraine is a party becomes the part of the Ukrainian legislation if it is properly published in the official journal and included in the Common state register of normative acts [8]. Unfortunately, at present stage the access to the information on the international agreements is complicated in default in the country of the full collection of the international agreements of Ukraine.

The universally recognized principles and norms of international law set the ground for the peaceful and mutually advantageous cooperation with members of international community, including the area of the protection of human rights (art. 18). However, they cover only international relations of Ukraine. The Constitution does not determine their place in the internal legal order. The priority of international principles over internal rules is proclaimed in the Declaration on Independence of 1990 [9]. But the provisions of the Declaration were not included in the Constitution of Ukraine.

All in all the basic provisions of the Ukrainian Constitution conform to the constitutional traditions of the European states regarding democratic principles, rule

of law, protection of human rights [10]. The proper guaranties for their implementation are provided by the court system.

In the Constitution of Ukraine the provisions regulating human rights occupy a prominent place. There is a special chapter II (art. 21-68) in the Constitution devoted to this area of legal regulation. It is called “The rights, freedoms and responsibilities of man and the citizens”. In terms of their general bases, their content, the possibilities of their limitation, the regime of their implementation and protection all of them are in conformity with the norms of the European Convention on Human Rights of 1950 which was signed by Ukraine in 1995 shortly before the adoption of the Constitution. Although the provisions of the Constitution on human rights are not classified into special groups (political, economic, social etc), they are quite detailed and the standards they contain are very high. Their modernization and adaptation to the new realities is done mainly by bringing amendments to the Constitution as well as by the interpretation and concretization of its provisions. This is happening through the adoption of laws and ratification of international treaties. In this regard important are the decisions of the Constitutional Court and other courts.

2. Constitutional Court of Ukraine and the Protection of Human Rights

The activities of the Constitutional Court are based on the Constitution and the Law of Ukraine of 1996 “On the Constitutional Court of Ukraine” [11].

According to these documents the Constitutional Court is the sole organ of constitutional jurisdiction in Ukraine. In its activities the Constitutional Court combines the functions of the constitutional control and constitutional supervision [12].

The jurisdiction of the Constitutional Court extends to verifying the constitutionality of laws and other legal acts of the Verkhovna Rada of Ukraine, acts of the President, acts of the Cabinet of Ministers, legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea; conformity of international treaties of Ukraine that are in force or international treaties which are submitted to the Verkhovna Rada for granting consent to their binding nature with the Constitution of Ukraine; observance of the constitutional procedure for investigation and consideration of a

case on removal of the President from office through impeachment; official interpretation of the Constitution and laws of Ukraine.

The part that covers human rights matters embraces the issues concerning the compatibility of the laws and other normative act with the Constitution as well as official interpretation on the Constitution and other laws of Ukraine.

The list of those who may bring the actions before the Constitutional Court is quite long and may be divided into two groups. The first one includes the President, People's Deputies (at least forty-five), the Supreme Court of Ukraine, Human Rights Representative of the Verkhovna Rada of Ukraine, the Verkhovna Rada of the Autonomous Republic of the Crimea. The second one covers the natural and legal persons.

Their legal standing in the Constitutional Court is different. The state bodies may initiate proceedings as to the conformity to the Constitution of legal acts and interpretation of the basic law. The natural and legal persons may lodge appeal in order to obtain the official interpretation of the Constitution.

The state bodies may submit to the Constitutional Court the matters regarding the conformity of norms of the effective legislation with the principles and norms of the Constitution concerning the human and citizen's rights and freedoms.

The issues on initiating of such proceedings embrace: disputable questions concerning constitutionality of laws and other legal acts adopted and promulgated in accordance with the established procedure; disputable questions concerning constitutionality of legal acts revealed in the process of general court proceedings; disputable questions concerning constitutionality of legal acts revealed by bodies of executive power during their application and by the Authorised Human Rights Representative of the Verkhovna Rada of Ukraine during his/her activities (art 82 of the Law on the Constitutional Court).

The Constitutional Court adopts its decisions concerning unconstitutionality of legal acts in whole or in part on the grounds of non-conformity with the Constitution of Ukraine; violation of the procedure for their consideration, adoption or entry into force established by the Constitution; excess of constitutional authorities during their adoption.

The state bodies may also submit to Constitutional Court a constitutional petition on matters concerning constitutionality of legal acts which inconsistently regulate the realisation of the constitutional human and citizen's rights and freedoms.

In these cases the subject matter of initiation of constitutional proceedings are resolution of disputable issues concerning constitutionality of norms of two or more laws or acts of international law recognised as obligatory on the territory of Ukraine, which inconsistently regulate realisation of the same constitutional rights and freedoms and thus substantially restrict the possibilities of their exercise (art. 84 of the Law on the Constitutional Court).

The decision of the Constitutional Court determines norms of which law are constitutional and norms of which law are unconstitutional and invalid.

As it was mentioned before the issues of the protection of human rights may arise before the Constitutional Court when it provides for the interpretation of the Constitution.

In such instances the state bodies may submit to the Constitutional Court a constitutional petition for an official interpretation of the Constitution and laws on the grounds of the practical necessity of clarification, explanation and official interpretation of provisions of the Constitution and laws of Ukraine. (art. 93 of the Law on the Constitutional Court).

In contrast to that the right of a constitutional appeal of the citizens to the Constitutional Court is quite limited. It is restricted by the cases when the Constitutional Court provides for the official interpretation of the Constitution and the laws of Ukraine in order to ensure implementation or protection of the constitutional human and citizen's rights and freedoms as well as the rights of a legal entity. Subjects of the right to constitutional appeal for providing opinions by the Constitutional Court are citizens of Ukraine, foreigners, stateless persons and legal entities.

The grounds for such an appeal are dubious application of provisions of the Constitution or laws of Ukraine by courts of Ukraine, other state bodies, if the subjects of the right to constitutional appeal consider it may lead or has led to

violation of their constitutional rights and freedoms (art 94 of the Law on the Constitutional Court).

Within the ambit of its jurisdiction the Constitutional Court adopts decisions and provides opinions.

The Court's rulings regarding all these matters are mandatory for execution in Ukraine. They are final and cannot be appealed [13]. Laws and other legal acts, or their separate provisions, that are deemed unconstitutional, lose legal force.

The Constitutional Court also issues opinions on the constitutionality of currently effective international treaties to which Ukraine is a party or which are submitted for their ratification. In these cases subjects of appeal are the President of Ukraine and the Cabinet of Ministers. There is no clear indication neither in the Constitution nor in the Law on the Constitutional Court as the legal force of such Constitutional Court's opinions. As the former judge of the Constitutional Court P. Martinenko points out the practice of the Constitutional Court shows that the opinions of the Constitutional Court in these matters are to be taken into consideration, but are not binding [5].

The Constitutional Court does not have the jurisdiction concerning the official interpretation of international agreements. It means that the Ukrainian citizens, foreign citizens, legal persons cannot apply to the Constitutional Court on the matters of issuing opinion as to the official interpretation of international agreements, including the conventions on human rights.

After 1997 the Constitutional Court broadly interpreted the Constitution in the light of the European Convention on Human Rights and other international agreements in this area when it has dealt with the protection of human rights. As a rule in its judgments it referred to the art. 9 of the Constitution. The Constitutional Court has taken into consideration that the norms of the Constitution of Ukraine concerning the human rights and freedoms are very similar to the corresponding provisions of the European Convention of Human Rights.

The Constitutional Court also turned to advantage the interpretation of the European Convention made by the European Court of Human Rights. They served to

the Constitutional Court to a large extent as a methodological guidance and as an instrument for the internal interpretation of the norms.

However, the Constitutional Court has to make difference between the provisions of the Convention on Human Rights and their interpretation by the European Court of Human Rights since their legal status in the Ukrainian legal order is not the same. Constitutional Court is not obliged to follow to the interpretation of the European Convention on Human Rights done by the European Court of Human Rights. Otherwise it would violate the Ukrainian legislation since only the provisions of the Convention are part of it. In practice the Constitutional Court endeavors to avoid any possible contradictions between its judgments and the decision of European Court of Human Rights. To this end before passing its judgments the Constitutional Court familiarizes itself with the legal position on the issue of the European Court of Human Rights.

The most important decisions of the Court concern: 1) the compatibility of the provisions of the Constitution (art. 55, 66, 124) to the obligations of Ukraine deriving from the European Convention of Human Rights which according to art.9 of the Constitution is a part of the legislation of Ukraine (decision of 1997) ; 2) the right to live; 3) the abrogation of the death penalty as a means of punishment (art. 24, 58, 59, 60, 93, 190-I of the Criminal Code of Ukraine) (art. 3 of the European Convention and art. 28 of the Constitution); 4) the right to referendum; 5) the right to own, use and dispose of property (art.41 of the Constitution) with the exceptions that cover the forced alienation of private property for reasons of social necessity, in condition of war or an emergency etc.; 6) the right of citizens to freely associate into volunteer organizations, specifically, to form trade unions and enter into them in order to defend and satisfy their economic and social interests (art. 11 of the European Convention). Exceptions concern restrictions imposed by the law in the interests of national security and public order or to protect the population health or defend the right and freedoms of other individuals; 7) the right to the just trial; 8) the right to return to people their deposits in the banks etc. The other judgments of the Constitutional Court related to the creation of normal conditions for the administration of justice and thus for exercising of one's rights and freedoms etc.

The bulk majority of the Constitutional Court's rulings concerning the protection of human and citizen's rights and freedoms resulted from the actions brought by the Authorised Human Rights Representative of the Verkhovna Rada of Ukraine. Since the legal standing of the citizens in the Constitutional Court is restricted there were only few cases resulted from the proceeding initiated by them [14].

Although the Constitutional court decisions are binding to everyone there exist some hesitations and delays in their enforcement. It indicates that in Ukraine as in some other new democracies the role of the Constitutional court as last instance on questions of the constitutionality and the protection of human rights is underestimated both by the authorities and society.

Constitutional court decisions have led to the amendment of legislation and other normative acts, new trials. After its judgments numerous statutory provisions as well as judgments of the courts of general jurisdiction which limited human rights and freedoms of the citizens of Ukraine have been abrogated.

The Ukrainian legislation contains no clear prohibition for the Constitutional Court to refer in its practice to the decisions of the national courts of other European countries. However, the Constitutional court actually does not do it, which is unfortunate, since if otherwise it could add objectivity and efficiency to its decisions. The only way of influence of the courts of other European countries on the practice of the Constitutional Court of Ukraine is done through the European court of Human Rights, which in its decisions devotes great attention to the case-law of the national courts of its member-states.

3. The enforcement in Ukraine of the judgments of the European Court of Human Rights

The contribution of other Ukrainian courts in the affirmation of the constitutional concept of the protection of human rights and freedoms in Ukraine is also conspicuous.

The Supreme Court of Ukraine is the highest judicial body in the system of courts of general jurisdiction. Its powers are extended to the interpretation of the

issues concerning the execution of legislation on the bases of generalizing of judicial practice and the analysis of judicial statistics[15].

The most important resolutions of the Supreme Court concern: 1) the obligatory enforcement of the European convention by national courts of general jurisdiction as a part of the Ukrainian legislation in cases pending before the courts; 2) the enforcement of the ruling of the European Court of human rights by national courts; 3) the recovery of moral damages for the violation of people's rights to express their views (art. 10 of the European convention); 4) the right of private ownership (Protocol 1 of the European convention); 5) the monitoring of police violence (art.3 of the European convention); 6) the right to a trial within a reasonable time (art.6 of the European convention); 7) detention and other forms of interference with personal liberty (art.6 of the European convention).

The majority of these resolutions were provoked by the judgments of the European Court of Human Rights.

The number of decisions of the European court against Ukraine in 2014 amounted to 10330. In terms of number of cases pending before the European court Ukraine occupies the 4th place among the member-states. More than 60% of them concern violation of the right to a trial within a reasonable time. The remainder deal mainly with police violence.

The enforcement of the decisions of the European Court of Human rights has double-fold consequences.

Ukraine has to pay to the plaintiffs the compensation designated by the European Court of Human Rights and the decisions of the national courts. From 2001 to 2013 Ukraine had to pay from the state budget around 147 millions Euros for these purposes [16].

On the other hand, Ukraine has to make amendments to the internal legal acts in order to prevent the further violations of the provisions of the European Convention on Human Rights. More than ten drafts of such amendments were prepared for the last year only. They concerned the draft laws on the amendments to some legislative acts concerning the right of a individual to the pretrial procedure, consideration of a case by the judicial body or the administration of justice within a reasonable time; on

the amendments to some legislative acts concerning the guaranteeing the rights of the detainees who are under arrest as well as convicts to the free correspondence with an advocate; on the amendments to some legislative acts concerning the medical treatment of an individual by means of the forced feeding subject to the court ruling in accordance with the medical evidences; on the amendments to some legislative acts concerning the grounds for the revision of judgments by way of the exclusive proceedings; on the amendments to some legislative acts concerning the location of children in the receiver-distributor for children; the holding in custody of individuals who have mental disease; on the amendments to some legislative acts concerning the extension, suspension of the enforcement or change of measures of the medical character.

In 2006 Ukraine passed the Law on the enforcement of decisions and application of practice of the European Court of Human Rights [17]. According to that law the Ministry of Justice is charge for conducting legal expertise of all legislative acts, by-laws, their drafts which pertain to the area of legal regulation by the European Convention on Human Rights as to their compatibility with the provisions of the Convention. Such an expertise is aimed at the prevention of the violation in the future of The European Convention caused by the imperfection of legal regulation.

The problem is that not all normative acts are send to expertise. On the other hand, the conclusions of the Ministry not always are taken into consideration by the drafters.

As follows from the Law on the enforcement of decisions and application of practice of the European Court of Human Rights, the national courts of Ukraine while hearing the case shall use the European Convention on Human Rights as well, the practice of the European Court of Human Rights. According to the art. 17 of the Law the European Convention and the practice of the European Court of Human Rights are considered as sources of law in Ukraine.

In this respect no problems arises from the use of the Convention by national courts since it is a part on the internal legislation and have the direct effect in the internal legal order of Ukraine. The obligatory character of the judgments of the European Court against Ukraine is also beyond any doubt. What remains disputable

is the issue of the use of the European Court's practice as a source of law. Although it is accepted on the doctrinal level that the European Convention is not able to be effective without its interpretation by the European Court, still it is not easy for the country that belongs to the European continental legal family to allow a judicial precedent penetrating into its legal system as a sources of law, based on the European Court's rulings [18]. So, this provision of the Law on the enforcement of decisions and application of practice of the European Court of Human Rights may be considered as being at variance with the Constitution of Ukraine regarding the application by the national courts of the practice of the European Court of Human Rights.

On the other hand, it is problematic for the national courts to use the decisions of the European Court of Human Rights since they are not published in the country and thus are not available.

4. Conclusions

The constitutional concept of the protection of human rights and freedoms in Ukraine needs further affirmation. The mere fixing in the Constitution of the catalogue of human rights based on the international documents is not enough for the recognition of priority and the leading role of human rights and freedoms in the relation between an individual and the state bodies. The state is obliged to create the proper conditions for the realization of these rights. In this respect important is the formation of the efficient mechanisms that are able to help an individual to enjoy his/her rights. In Ukraine there still exists a difference regarding the implementation of the civil and political rights, on the one hand, and social and economic rights – on the other.

The European Convention on Human Rights and other international treaties in this area constitute a vital international component of the protection of human rights and freedoms in Ukraine. They form a part of the Ukrainian legislation and are used by the Constitutional Court and other national courts in their practice. This is very important for maintaining in Ukraine the European standards of the protection of human rights.

Since the norms of the European Convention on Human Rights are quite general and are formulated in a rather abstract and evaluating manner the concrete content of their provisions may be found out in the decisions of the European Court of Human Rights. The judgments of the European Court of Human Rights constitute precedents. In Ukraine the precedents are not recognized as a source of law and the list of such sources is inclusive. While exercising the constitutional control the Constitutional Court of Ukraine may refer to the judgments of the European Court of Human Rights in the reasoning part of its decisions. Although the Constitutional Court of Ukraine is not obliged to take into consideration the practice of the European Court of Human Rights, but actually it does it taking account of the experience and authority in this area of the latter. The national courts of Ukraine may apply the norms the European Convention on Human Rights and refer to the judgments of the European Court of Human Rights only in connection with the proper norm of the Convention.

On the other hand the European Convention on Human Rights and the judgments of the European Court of Human Rights may serve as instruments for of improvement of national legislation in Ukraine. Although the existing legal system in the country in field of the protection of human rights requires reforming of judicial system, criminal procedure, public prosecution, even more important is to fulfill the requirements of the Constitution and the existing legal acts.

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