

СУЧАСНА СИСТЕМА МІЖНАРОДНОГО ПРАВА

УДК 342.56(477):341.231.14

UKRAINIAN COURTS AND THE PROTECTION OF HUMAN RIGHTS

УКРАЇНСЬКІ СУДИ ТА ЗАХИСТ ПРАВ ЛЮДИНИ

УКРАИНСКИЕ СУДЫ И ЗАЩИТА ПРАВ ЧЕЛОВЕКА

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Abstract. *The article is focused on the interaction between the Ukrainian courts of general jurisdiction and the Constitutional Court of Ukraine in the area of the protection of human rights. There is emphasized that their independent functioning does not provide for the efficient protection of individual rights and freedoms and significantly increases the number of the judicial recourses of the Ukrainian citizens to the European Court of Human Rights. Particular attention is paid to the role of the Constitutional Court of Ukraine in the protection of human rights, which combines the functions of the constitutional control and constitutional supervision. Its activities are focused on the official interpretation on the Constitution of Ukraine. Attention is paid to the list those who may bring the actions before the Constitutional Court, which includes apart from the state bodies the natural and legal persons. The is mentioning of the issues on initiating of proceedings before the Court. Also broadly is analyzed Constitutional Court' activities concerning the interpretation of the Constitution in the light of the European Convention on Human Rights and other international agreements dealing with the protection of human rights. The article stresses on the contribution of other Ukrainian courts in the affirmation of the constitutional concept of the protection of human rights and freedoms in Ukraine. The majority of resolutions of such highest judicial body in the system of courts of general jurisdiction as the Supreme Court of Ukraine concern the judgments of the European Court of Human Rights. As it is emphasized in the article the independent functioning on the Constitutional Court and the courts of general jurisdiction does not provide for the cooperation between both branches of courts. Courts of general jurisdiction feel free as to the appeal to the Constitutional Court. Even when such appeals are directed to Constitutional Court the decisions of the letter are not binding to the courts of general jurisdiction. Special attention is paid to the introduction*

of the institute of constitutional complaint and its positive effect on the judicial mechanism of the protection of human rights in Ukraine.

Key words: *Constitution of Ukraine, Constitutional Court of Ukraine, Courts of General Jurisdiction, Human Rights, European Court of Human Rights, constitutional appeal.*

Анотація. *Стаття присвячена взаємодії українських судів загальної юрисдикції та Конституційного суду України в сфері захисту прав людини. У ній підкреслюється, що їх незалежне функціонування не забезпечує ефективний захист прав і свобод людини і значною мірою збільшує кількість юридичних звернень з боку українських громадян до Європейського суду з прав людини. Особлива увага приділена ролі Конституційного суду України у питаннях захисту прав людини, який поєднує функції конституційного контролю та конституційного нагляду. Його діяльність зосереджена на офіційному тлумаченні Конституції України. Увага приділена переліку тих, хто може звертатися до Конституційного суду, який включає окрім органів влади фізичних і юридичних осіб. Розглянуті питання ініціювання слухань у Суді. Також широко аналізується діяльність Конституційного суду стосовно тлумачення Конституції у світлі Європейської конвенції з прав людини та інших міжнародних договорів, які пов'язані з захистом прав людини. У статті робиться наголос на внеску інших українських судів у затвердженні конституційної концепції захисту прав і свобод в Україні. Переважна більшість постанов такої вищої судової установи у системі судів загальної юрисдикції як Верховний суд України стосується рішень Європейського суду з прав людини. Як зазначається у статті незалежне функціонування Конституційного суду і судів загальної юрисдикції не сприяє співробітництву обох гілок судових установ. Суди загальної юрисдикції вільні у апеляційних зверненнях до Конституційного суду. Навіть коли подаються апеляції до Конституційного суду його рішення не є обов'язковими для судів загальної юрисдикції. Спеціальна увага приділена запровадженню інституту конституційної скарги та його позитивного впливу на захист прав людини в Україні.*

Ключові слова: *Конституція України, Конституційний суд України, суди загальної юрисдикції, права людини, Європейський суд з прав людини, конституційна скарга.*

Аннотация. *Статья посвящена взаимодействию украинских судов общей юрисдикции и Конституционного суда Украины в сфере защиты прав человека. В ней подчеркивается, что их независимое функционирование не обеспечивает эффективную защиту прав и свобод человека и в значительной степени увеличивает количество юридических обращений со стороны украинских граждан в Европейский суд по правам человека. Особенное внимание уделено роли Конституционного суда Украины в вопросах защиты прав человека, который объединяет функции конституционного контроля та конституционного надзора. Его деятельность сосредоточена на официальном толковании Конституции Украины. Внимание уделено перечню тех субъектов, которые могут обращаться в Конституционный суд, который включает кроме органов власти физических и юридических лиц. Рассмотрены вопросы инициирования слушаний в Суде. Также широко анализируется деятельность Конституционного суда в отношении толкования Конституции в свете Европейской конвенции по правам человека и других международных договоров, которые связаны с защитой прав человека. В статье делается упор на вкладе других украинских судов в утверждение конституционной концепции защиты прав и свобод в Украине. Преобладающее большинство постановлений такого высшего судебного органа в системе судов общей юрисдикции как Верховный суд Украины касается решений Европейского суда по правам человека. Как указывается в статье независимое функционирование Конституционного суда и судов общей юрисдикции не способствует сотруду-*

ничеству обеих ветвей судебных органов. Суды общей юрисдикции вольны в вопросах апелляционных обращений в Конституционный суд. Даже когда подаются апелляции в Конституционный суд, его решения не являются обязательными для судов общей юрисдикции. Специальное внимание уделено введению института конституционной жалобы и его позитивного влияния на защиту прав человека в Украине.

Ключевые слова: Конституция Украины, Конституционный суд Украины, суды общей юрисдикции, права человека, Европейский суд по правам человека, конституционная жалоба.

Current problems. The judicial system of Ukraine consists of two branches of courts that function separately and independently. These are the Constitutional court and the courts of general jurisdiction. However, they may cooperate with each other in some matters when they find it appropriate. The mechanism for such cooperation is provided by the Law of Ukraine of 1996 “On the Constitutional Court of Ukraine” [1].

The most important area of cooperation between the Ukrainian courts is the protection of human rights.

The aim of the article is to define the consequences of the narrow cooperation between the Constitutional Court of Ukraine and the courts of general jurisdiction in the area of the protection of human rights in the country.

Important research results. The necessity The provisions regulating human rights occupy a prominent place in the Constitution of Ukraine, which pertains to the new generation of Constitutions. It was adopted in 1996 [2]. 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 [3]. 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 since the court system of Ukraine shall provide the proper guaranties for their implementation.

According to the Law of Ukraine “On the Constitutional Court of Ukraine” 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 [Назаренко, 2005: 90–96].

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 of Ukraine").

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 realization 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 recognized as obligatory on the territory of Ukraine, which inconsistently regulate realization 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 of Ukraine").

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

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 of Ukraine").

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 "On the Constitutional Court of Ukraine").

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 [5]. 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 either in the Constitution or in the Law on the Constitutional Court as to the legal force of such Constitutional Court's opinions. As the former judge of the Constitutional Court P. Martinenko pointed 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 [6].

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 which 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 Constitutional Court has also 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 Constitutional 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 Constitutions 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 [7].

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.

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.

However, independent functioning on the Constitutional Court and the courts of general jurisdiction narrows the areas of the cooperation between both branches of courts. Courts of general jurisdiction appeal to the Constitutional Court fragmentarily. In cases of such appeals the decisions of the Constitutional Court are not binding to the courts of general jurisdiction.

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 [8].

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 other violations 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 hryvna for these purposes [9].

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.

In 2006 Ukraine passed the Law “On the Enforcement of Decisions and Application of Practice of the European Court of Human Rights [10]. 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 “On the Enforcement of Decisions and Application of Practice of the European Court of Human Rights 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 [Шевчук, 2007]. 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.

Conclusions. Ukrainian courts play the key role in the protection of human rights in the country. As the European Convention on Human Rights and other international treaties in this area form a part of the Ukrainian legislation they 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. However, the independent functioning of the Constitutional Court and the courts of general jurisdiction undermines to a large extent the efficiency of the whole system of the protection of human rights in Ukraine. The regular character of the constitutional appeals of the courts of general jurisdiction to the Constitutional Court of Ukraine for providing its legal opinions may drastically curtail the number of the judicial recourses of the Ukrainian citizens to the European Court of Human Rights.

References

1. Закон України “Про Конституційний суд України”, 16.10.1996 № 422/96-ВР. [The Law of Ukraine “On the Constitutional Court of Ukraine”, 16.10.1996 № 422/96-VR], <<http://zakon2.rada.gov.ua/laws/show/422/96-%D0%B2%D1%80>>
2. Конституція України, 28.06.1996 № 254к/96 -ВР. [Constitution of Ukraine, 28.06.1996 № 254к/96-VR] <<http://zakon3.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80>>
3. Закон України “Про ратифікацію Конвенції про захист прав и свобод людини 1950 року, Першого протоколу та протоколів №№ 2, 4, 7 и 11 до Конвенції” // Відомості Верховної Ради. – 1997. – № 40. – Ст. 263; Указ Президії Верховної Ради Української РСР № 2148-VIII від 19 жовтня 1973 року про Ратифікацію Міжнародного пакту про громадянські та політичні права та про ратифікацію Міжнародного пакту про економічні, соціальні й культурні права. [The Law of Ukraine “On the Ratification of the Convention on Human Rights of 1950, The First Protocol and the Protocols № 2, 4, 7 and 11 to the Convention // Vedomosti of the Supreme Council of Ukraine – 1996. – № 40. – Art. 263; The Decree of the Presidium of the Supreme Council of Ukrainian SSR № 2148-VIII of October 19 1973 “On the Ratification of the International Pact on Civil and Political Rights and the Ratification of the International Pact on Economic, Social and Cultural Rights”].
4. Назаренко О. А. (2005) *Співвідношення Конституції та міжнародних договорів України* [The Correlation between the Notion of the Constitutional Control and the Constitutional Supervision in the Characteristic of the Constitutional Court of Ukraine] // Часопис Київського Університету права. – № 3: 90–96.
5. Конституція України, 28. 06. 1996 № 254к/96 -ВР. [Constitution of Ukraine, 28. 06. 1996 № 254к/96-VR.], <<http://zakon3.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80>>
6. Мартиненко П. Ф., Кампо В. М. (2007) *Конституція і конституціоналізм в Україні: вибіркові проблеми. Збірник наукових праць членів Товариства конституційного права з нагоди десятої річниці Конституції України, Конституційного Суду України та самого Товариства* [The Constitution and Constitutionalism in Ukraine: Collection of Scientific Works by the Members of the Association of the Constitutional Law on the Occasion of the 10th Anniversary of the Constitution of Ukraine. The Constitutional Court of Ukraine and the Association itself]. Київ.
7. *Основи конституційного права України*. Підручник. 2-е вид. стер. / За ред. В. В. Копейчикова (2000) [The Foundations of the Constitutional Law of Ukraine: Manual. 2nd Ed] – Київ : Юрінком Інтер.
8. Закон України “Про судоустрій і статус суддів” 07. 07. 2010, № 2453-VI. [Law of Ukraine “On the Judicial System and Status of Judges”, 07. 07. 2010, № 2453-VI], <<http://zakon4.rada.gov.ua/laws/show/2453-17>>
9. *Kulchitskiy N. Ukraine’s paid 147 mln hryvna for the Violations of Human Rights*. 15. 04. 2013. <<http://ua.krymr.com/archive/news-uk/20150601/16928/16928.html?id=25335933>>
10. Закон України “Про виконання рішень и застосування практики Європейського суду з прав людини” // Відомості Верховної Ради України. [The Law of Ukraine “On the Enforcement of Decisions and Application of Practice of the European Court of Human Rights” // Vedomosti of the Supreme Council of Ukraine] – 2006. – № 30. – Ст. 260.
11. Шевчук С. (2007) *Судовий захист прав людини: Практика Європейського суду з прав людини у контексті західної правової традиції* [The Judicial Protection of Human Rights: The Practice of the European Court of Human Rights in the Context of the Western Legal Tradition] – Вид. 2-е, випр., доп. – Київ : Реферат.