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LEGAL ISSUES OF THE IMPLEMENTATION OF THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS 1950 IN UKRAINE

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Abstract *This note is devoted to the study and analysis of legal issues of the implementation of the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) in Ukraine. The research states that the Convention is one of the first human rights documents based on the principles of ensuring objective standards and providing protection to individuals against abuse of state power. The note proves that the Convention, which is inherently a new generation treaty, not only establishes rights and obligations for states that are traditional for sources of classical international law but also enshrines the obligations of Member States to its citizens, individuals, and legal entities – all those under its jurisdiction.*

The research stipulates that with its accession to the Council of Europe in 1995, Ukraine not only showed its recognition of the rule of law but also undertook the commitments to ensure human rights and fundamental freedoms, thereby confirming its European democratic choice. In 1997, with the ratification of the Convention, a new stage began in the development of human rights and fundamental freedoms in Ukraine.

The note states that Ukraine takes third place among the 47 Member States of the Council of Europe in terms of the number of appeals to the European Court of Human Rights. A negative tendency to increase the submission of complaints by citizens of Ukraine to the European Court of Human Rights is intensifying every year. This indicates that nowadays, the need to achieve maximum compliance of Ukrainian legislation with European standards in the field of human rights and the prevention of their violations remains urgent.

The note concludes that at the present stage, among the most problematic issues of Ukraine's cooperation with the Council of Europe is the reform of the judiciary – in particular, bringing it in line with European norms in accordance with the recommendations of the Councils of Europe institutions, strengthening the fight against corruption, etc.

The authors offer a set of proposals and recommendations on the necessity of achieving maximum compliance of Ukrainian legislation with the European standards of the Council of Europe in the field of human rights and prevention of their violations to reduce the number of appeals of Ukrainian citizens to the European Court of Human Rights.

The research emphasises that the construction of a democratic legal state and Ukraine's accession into the European system of human rights protection should exist in reality, as

well as be supported by the relevant internal and external policy of the country in regard to human rights, the harmonised system of legislative acts, and the real mechanisms of guarantees of fundamental freedoms.

Keywords: *Human Rights, European Values, Fundamental Freedoms, Judicial System, European Vector, Legal Instruments, European Court of Human Rights, Implementation Process.*

1 INTRODUCTION

Seventy years have passed since the European states signed the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (hereafter – the Convention). Ukraine joined the Convention on 17 July 1997[1]. Thus, Ukraine became a member of a large community of states that share European values, such as the rule of law, respect for human rights, freedom, and democracy. Adherence to these values plays a crucial role in the implementation of the strategic course for Ukraine's membership in the European Union and the North Atlantic Treaty Organization.

Ukraine is a party to the most important international conventions on human rights – in particular, the Universal Declaration of Human Rights 1948,[2] the International Covenant on Civil and Political Rights 1966,[3] the International Covenant on Economic, Social and Cultural Rights 1966,[4] the Convention on the Elimination of All Forms of Discrimination against Women 1979,[5] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment 1984,[6] the Convention on the Rights of the Child 1989,[7] the Convention on the Rights of Persons with Disabilities 2006,[8] and others. This is primarily due to Ukraine's overall commitment to promoting and respecting human rights and fundamental freedoms, as well as their observance.

The participation of Ukraine in the Council of Europe plays a key role in this process.[9] The creation of the Council of Europe began immediately after the end of World War II when the leaders of European countries began to take measures to ensure that such death and suffering of people did not happen again. Due to the initiative of British Prime Minister Winston Churchill on 5 May 1949 in London, governments of ten European countries gathered to establish the Council of Europe. Its purpose was to achieve a greater unity

1 Convention for the Protection of Human Rights and Fundamental Freedoms Council of Europe 1950 <https://www.echr.coe.int/documents/convention_eng.pdf> accessed 30 January 2021.

2 The Universal Declaration of Human Rights 1948 <https://www.un.org/en/universal-declaration-human-rights/> accessed 4 February 2021.

3 International Covenant on Civil and Political Rights 1966 <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> accessed 4 February 2021.

4 International Covenant on Economic, Social and Cultural Rights 1966 <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> accessed 4 February 2021.

5 Convention on the Elimination of All Forms of Discrimination against Women Adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180 of 18 December <https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx> accessed 4 February 2021.

6 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment 1984 <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx> accessed 4 February 2021.

7 Convention on the Rights of the Child 1989 <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> accessed 30 January 2021.

8 Convention on the Rights of Persons with Disabilities 2006 <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html> accessed 30 January 2021.

9 P Martynenko, 'The Constitution and Constitutionalism in Ukraine' in 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, (Istyna 2007) 211–213.

between its members through agreements and joint activities in the economic, social, cultural, scientific, legal, and administrative spheres, as well as in the field of preservation and further development of human rights and fundamental freedoms.[10] Obviously, at that time, the main goal of the Council of Europe was to prevent the disappearance of the idea of fundamental human rights from the political landscape of the Old World, and therefore, the leaders of European countries decided to unite the efforts of all the European countries.

Among other reasons for the creation of an international organisation in Europe was the need to establish a European idea. Such an idea was directed at the establishment of a single political organisation of countries and peoples of Europe.[11] In our opinion, this view is fateful, if we take into account the political situation in post-war Europe, because, for the first time in international relations within the European continent, there was a desire to create such an organisation, the main task of which would be not only the usual declaration of human rights but also the further consolidation them as one of the important principles of its activities.[12] This intention was subsequently embodied in the Statute of the Council of Europe. In accordance with Art. 3 of the latter, all Member States of this organisation would recognise the principle of the rule of law and the principle that any person under their jurisdiction should enjoy human rights and fundamental freedoms.[13] Moreover, Art. 8 of the Convention provides the suspension of membership in the Council of Europe. Furthermore, in some cases of serious violations of this principle, the Members of the organisation could even be excluded entirely.

2 KEY IDEAS AND PRINCIPLES OF THE COUNCIL OF EUROPE

In accordance with Art. 1 of the Council's of Europe Statute, the main goal of this international organisation is to achieve a greater unity between its Member States in order to preserve and implement common ideals and principles. In addition to this goal, the Council of Europe statutory documents include a set of main objectives. They are: the protection and strengthening of pluralistic democracy and human rights; the promotion of awareness and development of the European cultural identity; the search of common ways to solve social problems (in particular, the protection of national minorities, combating xenophobia, religious, racial, and ethnic intolerance, the protection of the environment, fighting AIDS, drug addiction, etc.); assisting Central and Eastern European countries in intensifying the process of political, legislative, and constitutional reforms; enormous political and legal activities; the unification and harmonisation of the European legislation; the adoption of the conventions that have a binding character for Member States of the Council of Europe.[14]

In our opinion, the establishment of the Council of Europe is a unique phenomenon. Immediately after its creation, there was the question of the adoption of a legally binding document, that is, an international treaty that would fix basic human rights and freedoms

10 Statute of the Council of Europe 1949 <https://assembly.coe.int/nw/xml/rop/statut_ce_2015-en.pdf> accessed 4 February 2021.

11 S Gromko, 'Formation of a Unified European Approach to the Concept of Human Rights and the Prerequisite for its Normative Consolidation in EU law' *Ukrainian Journal of International Law (2004) 8, 17–24.*

12 V Muraviov, N Mushak, *Judicial Control of Public Power as Legal Instrument for Protection of Human Rights and Fundamental Freedoms in Ukraine. Rule of Law, Human Rights and Judicial Control of Power* (Springer 2017).

13 Statute of the Council of Europe 1949 (n 10).

14 R Arnold, 'Anthropocentric Constitutionalism in the European Union: Some Reflections', in *The European Union – What Is Next?* (Wolters Kluwer 2018) 112–13.

at the European level. We explain this situation as follows: from the very beginning of its creation, the Council of Europe considered it necessary to act as an international organisation that would serve as a comprehensive standard for the protection and human rights, regardless of certain circumstances (peace or war) over the following centuries. And this indicates the farsightedness of the founders of this organisation.

3 THE IMPACT OF THE CONVENTION ON LEGAL SYSTEMS OF ITS MEMBER STATES

The Convention was the first international legal document on human rights that not only proclaimed human rights and called for their observance but also imposed certain legal obligations on the parties. It also introduced a system of control over the exercise and observance of human rights in Member States of the Council of Europe.

For decades, the Convention has been amended and supplemented by a set of protocols (16 protocols to it have been signed to date), thereby improving the mechanism of its action. Nowadays, the status of this document, its significance, and its impact on the internal legal systems of the Council of Europe Member States, as well as the development of international law as a whole, are difficult to overestimate.[15] The European human rights protection system was formed within the framework of the Council of Europe. The main instruments of this organisation ensure the protection of all categories of human rights. In general, the Convention and the system of international judicial control over the fulfilment of human rights duties by states have several characteristics. For instance, unlike classic international treaties, the Convention goes beyond mutual relations between Member States. In addition, objective obligations to the network of bilateral contractual obligations are created, which are provided by a collective guarantee.

The objective duty means a duty that in its content is related to a certain standard and scope of human rights from which the state cannot retreat.[16] In addition, this duty is permanent (in the universal or regional community of states), does not depend on the behaviour of other states, and makes it impossible to refer to this behaviour as an excuse for its misconduct. Recognising the objective nature of the state's obligations to protect human rights is a condition for the functioning of the European public order, which is a part of the system of human rights protection.[17] A separate issue of the system of the Convention is also the conditions under which its Member States exercise the provisions of this international treaty. The principle of *pacta sunt servanda* is enshrined in modern international law and requires Member States of the Convention to commit their obligations to the control of the European Court of Human Rights (hereafter: ECtHR).

4 UKRAINE AND THE CONVENTION

In 1997, Ukraine ratified the Convention, not only from a diplomatic point of view but also in the interests of the entire Ukrainian people. This event was a new and important stage in the development of Ukrainian jurisprudence in matters of the legal protection of

15 S Shevchuk, *The Judicial Protection of Human Rights: The Practice of the European Court of Human Rights in the Context of the Western Legal Tradition* (2nd edn, ammend., cor. Referat 2007).

16 V Evintov, 'Implementation of Decisions of the European Court of Human Rights: International and Ukrainian experience' in VN Denisov (ed) *Interaction of International Law with the Internal Law of Ukraine* (Justinian 2006) 184–197.

17 L Huseynov, *International Responsibility of States for Human Rights Violations* (int. by VM Koretsky, NAS of Ukraine 2000).

human rights and fundamental freedoms.[18] The event marked the beginning of the transfer of European legal values to Ukrainian culture.[19]

Ukraine's ratification of the Convention was a recognition that the state received additional, legally enshrined guarantees of its democratic development, and all Ukrainian citizens received an additional opportunity to defend their rights and legitimate interests. The sphere of human rights is the most important area in the construction of any independent, democratic, and legal state. According to the well-known international lawyer, G. Lautertracht, starting from 1950, a human being changed from an object of certain international compassion to the most important actor of international law.[20]

Ukraine's accession to the Convention was not only a guarantee of the full range of rights and freedoms but also ensured effective judicial control over their observance. Therefore, the normative legal grounds for application of the Convention are: the Constitution of Ukraine (Arts. 8-9, 22, 55-56, etc.),[21] the Law of Ukraine 'On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950', First Protocol and Protocol Nos. 2, 4, 7, and 11 to the Convention (title – as amended by the Law of Ukraine 'On Amendments to Certain Laws of Ukraine' No. 3436-IV of 9 February 2006[22]), and the Law of Ukraine 'On Enforcement of Decisions and Application of the Practice of the European Court of Human Rights' of 23 February 2006.[23]

At the same time, the implementation of the provisions of the Convention is monitored by the ECtHR, whose jurisdiction has key importance for the understanding of the peculiarities of its activities. The peculiarities of the ECtHR jurisdiction determine its place and role in the system of international institutions in general and in the system of monitoring mechanism of the Convention.[24] In particular, in accordance with Art. 32 of the Convention, the jurisdiction of the Court applies to all matters relating to the interpretation and application of the Convention and its protocols. According to Arts. 33–34 of the Convention, the Court may consider two types of cases: interstate, ie, cases initiated upon the application of one Member State in regard to the violation by any other State of the provisions of the Convention and its protocols, and cases initiated by individual applications. At the same time, in accordance with part 2 of Art. 32 of the Convention, only the Court may decide all disputes regarding the effective protection of human rights in the process of considering a particular case through a flexible understanding of its jurisdiction limits.

In regard to the legal nature of the ECtHR decisions, there are different views among Ukrainian scholars who examine the key peculiarities of these judicial decisions. The basis for the discussion is, logically, the question of whether such a court decision is a precedent.[25]

18 S Shevchuk, 'European Court of Human Rights and the Ukrainian Judiciary: The Need to Coordinate Judicial Practice' *Law of Ukraine* (2011) 7, 88–92.

19 S Holovatyi, 'New opportunities for the protection of human rights in Ukraine' *Practice of the European Court of Human Rights* (1999) 1, 11–18.

20 PA Leino, 'European Approach to Human Rights: Universality Explored' *Nordic Journal of International Law* (2002) 71, 455–495.

21 The Constitution of Ukraine 28 June 1996 <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80http:/www.zakon.rada.gov.ua> accessed 30 January 2021.

22 Law of Ukraine 'On Amendments to Certain Laws of Ukraine' of 9 February 2006 No 3436-IV <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=3436-15> accessed 25 January 2021.

23 Law of Ukraine 'On the Enforcement of Decisions and Application of Practice of the European Court of Human Rights' <https://zakon.rada.gov.ua/laws/show/3477-15> accessed 25 January 2021.

24 K Andrianov, 'The Question of Jurisdiction of the European Court of Human Rights' *Law of Ukraine* (2000) 8, 46–51.

25 E Shyshkina, 'Some Aspects of the Legal Nature of Decisions of the European Court of Human Rights' *Law of Ukraine* (2005) 4, 102–104.

Concerning the foreign experts in the field of jurisprudence, there is an opinion among British scholars that the legal nature of the Court's decisions should be considered mainly through the prism of judicial precedent in their inherent understanding. For example, the ECtHR's judicial practice in Anglo-American legal terminology is considered case-law and applies the definition of case-law. In contrast to the countries under the Anglo-American legal system, French researchers, such as Jean-François Renucci[26] and Frederick Sudre,[27] analyse the Court's decisions through the prism of a doctrinal view of judicial practice, defined by the French term jurisprudence. This term was historically developed in continental Europe and indicates that judicial practice is not a source of law.

In our opinion, the concept and content of judicial practice should not be replaced by the concept of 'judicial precedent' since judicial practice can constantly change due to the conditions for the development of society. In addition, it is judicial practice that serves as a source of law in rare cases in Ukraine, while judicial precedent is not recognised. Furthermore, the content of the rights enshrined in the Convention is constantly supplemented and clarified through the judicial practice of the ECtHR. Therefore, most scholars consider the ECtHR's judicial practice to be the second important source of the European human rights standards *de facto*.[28] Some Ukrainian scholars believe that the Convention does not provide legal grounds for giving these decisions the status of precedent in the understanding of English doctrine. Yet other scholars consider the ECtHR's decisions as precedent. S. Shevchuk argues that European case-law on human rights serves as an additional source of law when applying and interpreting the constitutional human rights norms that coincide with the fundamental rights enshrined in the Convention.[29]

It should be noted that we share the point of view of those scholars who recognise the creation of case-law by the ECtHR since this right is binding for all Member States of the Council of Europe. After all, when considering disputes on human rights violations, only the ECtHR has autonomy in matters of interpretation of the Convention. Furthermore, only the ECtHR does not depend on the domestic legislation and practice of national courts. When applying the norms of the Convention, revealing the categories of this document and the spirit of law laid down therein, the ECtHR reveals its essence not from the point of view of positivist law but from the point of view of the rule of law and human rights principle.[30] This approach provides grounds to conclude that the special status of the ECtHR has stemmed precisely from the ability to make an extraordinary decision. The peculiarities of such decisions determine their nature.

In turn, the decisions of ECtHR have key importance for Ukrainian legislation and its relationship with the wide range of human rights enshrined in the Convention. Despite the fact that more than 24 years have passed since Ukraine ratified the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, an important contribution to improving the system of human rights protection in Ukraine, today, there are still unresolved issues related to the recognition of the legal force of decisions of the ECtHR and the need to introduce a mechanism for the effective implementation of its decisions at the legislative level. The problem of Ukraine's failure to comply with the ECtHR's decisions has

26 Jean-Franois Renucci, *Droit europeen des droits de l'homme* (2nd edn, Librairie Generale de Droit et de Jurisprudence, EJA 2001).

27 Frederic Sudre, *Droit international et europeen des droits de l'homme* (5th edn, Presses Universitaires de France 2001).

28 V Rumyantseva, 'Appeal of Ukrainian citizens to the European Court of Human Rights: Review of the State' *Law of Ukraine* (2004) 3, 145–146.

29 S Shevchuk (n 18).

30 L Deshko, O Bodnar, 'Legal Nature of Decisions of the European Court of Human Rights' *Donetsk University Legal Journal* (2008) 2, 76–80.

become a challenge to the whole system of human rights protection built on the basis of the Convention. In addition, this issue has repeatedly become the subject of consideration by the Committee of Ministers and the Parliamentary Assembly of the Council of Europe.

According to the Ukrainian scholar S. Shevchuk, the impact of ECtHR practice on the national judiciary is decisive not only in the context of the implementation of individual decisions in regard to Ukraine but also because this system has a general (*erga omnes*) nature, which, in its turn, is determined by the normative (precedent) nature of ECtHR decisions. These decisions of a general nature not only affect the change of the positive paradigm of law in the field of human rights protection to the natural and legal one but also necessarily require public authorities of Ukraine to consider the established (precedent) practice of the ECtHR in law-making and law-enforcement activities.[31]

The first pilot decision of the ECtHR in regard to Ukraine entered into force on 15 January 2010 in *Yuri Ivanov v Ukraine*.[32] This case stated a violation of the Convention concerning the continued failure to comply with the decision of the national court. This position of the ECtHR is a completely natural reaction to the systematic failure to comply with the decisions of national courts and the state's failure to take effective measures to overcome this problem, taking into account the fact that since 2006, the Law of Ukraine 'On Enforcement of Decisions and Application of the Practice of the European Court of Human Rights' has been in force in Ukraine. Almost immediately after the decision in this case to eliminate the problem, Ukraine took a number of legislative measures. Thus, the Verkhovna Rada of Ukraine adopted the Law of Ukraine 'On State Guarantees for the Enforcement of ECtHR Decisions'[33] in 2012, and the Cabinet of Ministers adopted a Resolution 'On Approval of the Procedure for Repayment of Debts by ECtHR Decisions, the implementation of which is guaranteed by the State' in 2014.[34] However, despite these steps, the situation with the implementation of decisions by national courts has not changed in the last seven years. In particular, between 2013 and 2017, 12,143 cases were submitted to the ECtHR in *Burmich and others v Ukraine*.[35] These cases were united by one common systemic problem – non-compliance with the decision of national courts, which was previously mentioned in *Yuri Ivanov v Ukraine*.

It should be noted that the regulatory framework in the mechanism of implementation of ECtHR decisions is Art. 46 of the Convention. It contains a legal provision according to which 'the High Contracting Parties undertake to comply with the final judgment of the Court in any case in which they are parties'. A reference to this note is also contained in Art. 2 of the Law of Ukraine 'On Enforcement of Decisions and Application of the Practice of the European Court of Human Rights'. However, the regulatory framework itself is not enough, and practical implementation is also necessary. Nevertheless, the situation for practical implementation in Ukraine is extremely difficult.

At the end of 2020, almost 10,100 complaints in which Ukraine is the defendant were submitted to the ECtHR. The total amount of Ukrainian complaints was 16.5% out of all the ECtHR's workload. Therefore, Ukraine ranked third by the number of complaints against it. Russia was in

31 S Shevchuk (n 18).

32 Yuri Ivanov v Ukraine App No 40450/04 (ECtHR, 15 October 2009) <https://strasbourgobservers.com/2017/10/26/non-execution-of-a-pilot-judgment-ecthr-passes-the-buck-to-the-committee-of-ministers-in-burmych-and-others-v-ukraine/> accessed 9 February 2021.

33 Law of Ukraine 'On State Guarantees for the Enforcement of Judicial Decisions' <https://zakon.rada.gov.ua/laws/show/4901-17#Text> accessed 4 February 2021.

34 Resolution of the Cabinet of Ministers of Ukraine 'On Approval of the Procedure for Repayment of Debts by ECtHR Decisions, the implementation of which is guaranteed by the State' 2014 <https://zakon.rada.gov.ua/laws/show/440-2014-%D0%BF#Text> accessed 4 February 2021.

35 Burmich and others v Ukraine App No 46852/13 (ECtHR, 12 October 2017) <https://hudoc.echr.coe.int/fre#{%22itemid%22[%22001-178082%22]}> accessed 4 February 2021.

the first place with 14,050 complaints, and Turkey was in second place with 10,150 complaints. It is noteworthy that in comparison with the previous years, the number of complaints against Ukraine has increased. At the end of 2018, there were more than 7,200 complaints against Ukraine (or 12.9% of all the ECtHR's workload). In 2019, the number of complaints increased up to 8,850. Thus, the percentage of 'Ukrainian' cases increased to 14.8%.[36]

The main issues raised in statements submitted against Ukraine are: violation of Art. 3 of the Convention (prohibition of torture) – statements mostly relate to conditions of detention in prisons of persons sentenced to an exceptional degree of punishment – the death penalty is replaced by life imprisonment; violation of Art. 5 of the Convention (right to liberty and security) – these statements relate to human rights violations during detention and arrest; violation of Art. 6 of the Convention (right to a fair trial); violation of Art. 1 of Protocol No. 1 (right to free possession of property); violation of Art. 8 of the Convention (right to respect for family life), etc. In addition to these violations of the articles of the Convention, a significant number of complaints to the ECtHR coming from Ukraine also concern certain issues related to the penitentiary system, conditions of detention of accused persons in penitentiary institutions, treatment of prisoners, protection of their rights, etc.

One of the recent decisions of the ECtHR in regard to Ukraine's violation of Art. 3 of the Convention is the decision of 28 February 2019 in *Pankiv v Ukraine*.[37] The applicant insisted that he had been abused by the police and was forced to sign a 'remorse turnout', in which he confessed to stealing from the house of B. He was also forced to write a note that no physical force was used against him. In addition, the applicant cited medical evidence and claimed that it was established that he had suffered injuries while in police custody. He also claimed that while the authorities denied using force against him, they did not provide any credible explanation for the origin of his injuries. The authorities also selectively relied on a medical report of 23 January 2012 without providing a satisfactory explanation of the results of previous forensic examinations that supported his statement. The government denied any connection between the treatment of the applicant by the police and the fracture of his foot, explaining this injury by the fact that he accidentally turned his foot while going up the stairs. At the same time, the authorities relied on written statements of the applicant, given on the day of the alleged abuse, that the police did not treat him cruelly and that he turned his foot on the stairs. Authorities also cited the findings of a forensics report dated 23 January 2012.

On 28 February 2019, the ECtHR ruled that there had been a violation of Art.3 of the Convention in its procedural and material aspects and Art.6 § 1 of the Convention. In addition, the ECtHR obliged Ukraine to pay 16,000 EUR as compensation for moral damages incurred by the applicant due to violation of Art. 3 of the Convention to be paid to the applicant; 470 EUR as compensation for legal costs incurred in national proceedings; 2,200 EUR as compensation for legal costs incurred in court proceedings for payment to the bank account of the applicant's representative.

In the same year, the ECtHR also found violations of para. 1 and para. 3 of Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms *Vasyl Yakuba v Ukraine*.[38] In 2007, after a number of unspoken measures with fixation by technical means, Vasyl Yakuba was arrested with the use of physical force in connection with the sale of drugs.

36 Annual Report 2020 of the European Court of Human Rights, Council of Europe 2021 <https://www.echr.com.ua/wp-content/uploads/2021/02/ECHR_Annual_report_2020_ENG.pdf> accessed 4 February 2021.

37 Pankiv v Ukraine App No 37882/08 (ECtHR, 28 February 2019) <https://laweuro.com/?p=1207> accessed 4 February 2021.

38 Vasyl Jakuba v Ukraine App No 1452/09 (ECtHR, 12 May 2019) <https://laweuro.com/?p=1207> accessed 4 February 2021.

Subsequently, the examination showed characteristic features on the body, but the court decided that the force was applied within the limits of the law. The ECtHR found the accused person guilty of the crime, using video footage and written testimony from the agent as evidence. Although Mr Jakuba asked for a review of the video and the questioning of the witness, the relevant motions were not satisfied by the court. Appealing the verdict in the high courts was also unsuccessful.

In a statement submitted in 2009, the applicant claimed on the content of the provisions of Art.3 of the Convention that he was subjected to strict treatment by law enforcement agencies during his arrest, and he was not granted permission to review a video containing evidence of his sale of drugs to a secret agent (procurer) in accordance with Art.6 of the Convention, and that national courts did not provide him with the right to interrogate the procurer, in accordance with Art.34 of the Convention. The applicant denied the fact of selling drugs and complained that he was the victim of a provocation of the crime. His defence attorney persistently tried to prove that the applicant had purchased drugs for his own consumption and consumption of his friend only once, on 9 March 2007. In other words, the applicant tried to prove that he had committed a crime related to drugs, but he did not participate in three episodes of their acquisition, for which a stricter punishment was established. Consequently, the ECtHR faced the question of whether a criminal case against the applicant was indeed legally initiated, considering the inability to verify the identity of this person and view the video of the operational purchase.

The applicant also complained that the authorities refused to provide him with copies of the documents necessary to justify his application to the ECtHR. The ECtHR stated it was appropriate to consider this complaint under Art.34 of the Convention, which stipulates:

The Court may accept applications from any person, non-governmental organization or group of persons who consider themselves victims of the violation of the rights set forth in the Convention or protocols committed by one of the High Contracting Parties. The High Contracting Parties undertake not to impede in any way the effective exercise of this right.

The ECtHR concluded that the state authorities had not fulfilled their obligations under Art. 34 of the Convention due to the refusal to provide the applicant with copies of documents for an appeal to the Court. The applicant demanded 20,000 EUR for moral damages. Then, on 12 February 2019, the ECtHR noted that Ukraine violated para. 1 and para. 3 of Art. 6 of the Convention in regard to the recognition of unverified testimony of the agent as evidence against the applicant and not opening a video recording of operational procurement. The ECtHR also obliged Ukraine to pay 2,500 EUR in moral damages.

In addition to Ukraine's violation of Art. 3 of the Convention, the state often infringed on Art. 8 thereto on the protection of the human right to respect for its privacy. In this context, it should be noted the first decision made by the European Court of Human Rights regarding domestic violence in September *2020 in Levchuk v Ukraine*.[39] After the birth of triplets, the Levchuks were provided with social housing by the Rivne city council. The applicant's husband abused alcohol and threatened and caused physical violence against her. After the divorce, custody of all the children was transferred to the applicant. However, the applicant continued to live with her ex-husband in the same apartment. The father neglected his parental duties, did not carry out any financial participation in the upbringing of children, and continued ill-treatment of the mother of his daughters. The family often saw Mr Levchuk in a state of alcoholic intoxication and feared his unpredictable and aggressive behaviour. In 2016, Mrs Levchuk filed a lawsuit in the national local court to evict her ex-husband from

39 *Levchuk v Ukraine App No 17496/19 (*ECtHR, 9 July 2020) <https://www.cde.ual.es/ficha/case-of-levchuk-v-ukraine-application-no-17496-19/> accessed 4 February 2021.

the apartment, claiming that living together in an apartment was incompatible with normal life. Judicial proceedings in the national legal system lasted more than two years at three levels of jurisdiction. The local court satisfied the claimant's claim. The Court of Appeal noted that under these circumstances, there was no reason to apply such a last resort as eviction, although the ECtHR noted the need to warn the offender that he needs to change his attitude to the rules of common living with family members after divorce. The Supreme Court upheld the conclusions of the appellate court.

In the decision in *Levchuk v Ukraine*, the ECtHR referred to the decision in *Volodina v Russia* (App No 41261/17) of 9 July 2019.[40] The ECtHR noted that its decision contained a summary of relevant international materials. In *Volodina v Russia*, the ECtHR relied on universally applicable standards in the field of combating violence against women, in particular, the Convention on the Elimination of Discrimination against Women (CEDAW) of 1979,[41] reports of the UN Special Rapporteurs, Recommendation of the Committee of Ministers of the Council of Europe 'On the Protection of Women from Violence' of 30 April 2002,[42] the Council of Europe Convention on preventing and combating violence against women and domestic violence Istanbul of 11 May 2011,[43] etc.

The ECtHR also cited certain data from the OSCE study on violence against women. In conformity with this research, more than a quarter of women (26%) in Ukraine experienced physical and/or sexual abuse by a current or former partner. Two-thirds of women (65%) experienced psychological violence by intimate partners. This exceeds the gender-based violence average across the EU by 43% and is higher than in any other EU country. However, only 7% of women who experienced violence from their current partner and 12% of survivors of violence from their previous partner reported their experiences to the police.[44]

The ECtHR concluded in its decision that Ukraine had violated positive obligations to protect human rights to respect for privacy, ie, violation of Art. 8 of the Convention. In this decision, the ECtHR noted that by rejecting the woman's claim to evict her ex-husband, the national courts demonstrated an inability to conduct a comprehensive analysis of the situation and assess the risk of future psychological and physical violence against the applicant and children, and the duration of the trial put them at risk of further violence. The ECtHR stated that such a response of the courts to the applicant's claim for the eviction of her ex-husband did not meet the positive obligation of the state to ensure effective protection of the applicant from domestic violence.

There are many legal arguments supporting the recognition of the mandatory practice of the ECtHR for Ukraine. The most important legal acts are: the Law of Ukraine 'On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950', the First Protocol and Protocol Nos. 2, 4, 7, and 11 to the Convention of 17 July 1997, which states that Ukraine fully recognises the validity of Art. 46 of the Convention on the recognition of the jurisdiction of the European Court of Human Rights in all matters relating to the interpretation and application of the Convention, and Art. 17 of the Law of Ukraine 'On Enforcement of Decisions and Application of The Practice of the European Court of

40 *Volodina v Russia* App No 41261/17 (ECtHR, 9 July 2019) <https://blogs.lse.ac.uk/vaw/landmark-cases/a-z-of-cases/volodina-v-russia-2019/> accessed 4 February 2021.

41 Convention on the Elimination of All Forms of Discrimination against Women 1979 (n 4).

42 Recommendation of the Committee of Ministers of the Council of Europe 'On the Protection of Women from Violence' of 30 April 2002 <https://rm.coe.int/16805c7d22> accessed 24 January 2021.

43 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence 11 May 2011 <https://rm.coe.int/168008482e> accessed 24 January 2021.

44 O Kharitonova, *Court and Gender: ECHR issued its first decision against Ukraine regarding domestic violence, 2020* <https://50vidsotkiv.org.ua/sud-i-gender-yespl-vynis-pershe-rishennya-proty-ukrayiny-shhodo-domashnogo-nasylstva/> accessed 24 January 2021.

Human Rights' of 23 February 2006, which states that 'courts apply the Convention and the practice of the ECHR as a source of law when considering cases'.

Thus, the Law of Ukraine 'On Enforcement of Decisions and Application of the Practice of the European Court of Human Rights' established a system of institutional mechanisms for the implementation of ECtHR decisions at the legislative level. In particular, on 1 April 2020, the Cabinet of Ministers of Ukraine adopted a Resolution on the establishment of a Commission on the implementation of decisions of the European Court of Human Rights. This decision is aimed at involving different public authorities to ensure the implementation of ECtHR decisions and to ensure the coordinated interaction of all branches of power – legislative, executive, and judicial. It is envisaged that in the future, the Commission's activities will contribute to the improvement of the situation related to the proper fulfilment of Ukraine's international obligations, which will significantly reduce the state budget expenditures for the implementation of ECtHR decisions. At the same time, the establishment of the Commission will have a positive result only if the implementation of ECtHR decisions will take into account the financial aspect of the implementation of decisions, the restoration of violated rights, and the prevention of new violations. The need for such measures is justified by the fact that the decisions of the ECtHR should become a model and guideline in the judiciary of our state. Based on the practice of international bodies, citizens of Ukraine have to be ensured the proper protection at the national level.

As of 2020, Ukraine ratified 16 protocols to the Convention for the Protection of Human Rights and Fundamental Freedoms. In particular, on 1 August 2018, Protocol No. 16 to the Convention of 2 October 2013 came into force, allowing national courts to receive consultations in human rights cases in the ECtHR. The protocol was ratified by Ukraine with the application by Law No. 2156-VIII of 5 October 2017. Its adoption aims to strengthen the role of the ECtHR. In turn, it will contribute to the further implementation of the Convention in the national legal system. In particular, para. 1 of Art.1 of Protocol No. 16 states that the highest judicial institutions of one of the parties, as defined in accordance with Art.10, may apply to the ECtHR to provide advisory opinions on fundamental issues relating to the interpretation or application of the rights and freedoms defined by the ECtHR or its protocols. Art.1 of Protocol No. 16 also defines the circumstances under which national Higher Judicial Institutions can apply to the ECtHR. First, the case should be in the proceedings of the national high judicial institution, which has applied for an advisory opinion. Secondly, the national high judicial institution should indicate the reasons for its request and provide information on the relevant legal and factual circumstances of the case in the proceedings.

Protocol No. 16 entitles States Parties to the Convention independently – during its signing or submission to the storage of the ratification document – to determine in the application to the Secretary-General of the Council of Europe those higher courts that will have the right to apply to the ECtHR for advisory opinions. In accordance with Art.10 of Protocol No. 16, it is also determined that the Supreme Court is the highest court that is able to appeal to the European Court of Human Rights. Art.2 of Protocol No. 16 regulates that a panel of five judges of the Grand Chamber decides whether to accept a request for an advisory opinion. However, if a decision is made to refuse an advisory opinion, the Collegium should substantiate it.

The requirements for the ECtHR advisory opinions are set out in Art.4 of Protocol No. 16. Advisory opinions should be motivated and published. If the advisory opinion does not fully or partially express the unanimous opinion of the judges, each judge has the right to give a separate opinion. The advisory opinions are transferred to the requesting court and the High Contracting Party to which such a judicial institution belongs. In accordance with Art.5 of Protocol No. 16, advisory opinions are not binding.

With the entry into force of Protocol No. 16 due to the advisory opinions of the ECtHR, its case-law may significantly expand. Although the latter will not be binding on states whose

courts applied for their receipt (Art.5 of Protocol No. 16), they will create 'indisputable legal consequences' (Art. 11 of the Preliminary Conclusion on this PACE Commission Protocol) and will have binding force for the ECtHR itself. They will become part of its case-law along with decisions and decisions on the merits (judgments) of statements: 'The interpretation of the Convention and its protocols contained in such advisory opinions shall be similar in its effect to the correctly interpreted provisions established by the ECtHR in its decisions and rulings' (Art.27 of Comment No. 16). Therefore, the scope of the concept marked by the term 'Practice of the ECtHR' in the Law of Ukraine 'On the Enforcement of Decisions and Application of the Practice of the ECtHR' will require appropriate adjustment.[45]

5 CONCLUDING REMARKS

One of the most effective instruments for the protection of human rights within the Council of Europe is the ECHR with 16 protocols. The Convention has become the foundation of the whole complex of international legal regulation in the field of human rights, its legitimate interests and needs, and the starting point for civilized European states to implement universal human values.

In 2020, Ukraine continues to occupy third place among 47 Member States of the Council of Europe in terms of the number of appeals to the ECtHR. This situation is very disappointing, as it indicates numerous instances of improper protection of citizens' rights in their own state. In particular, the main issues raised in applications directed against Ukraine are violations of conditions of detention in prisons, the right to liberty and personal inviolability, the right to a fair trial, the right to free possession of their property, the right to respect for family life, etc. Non-compliance with these rights indicates not only the presence of problems at the national level but also ineffective judicial protection and significant gaps in domestic legislation.

Every year, there is an increasing number of complaints submitted to the ECtHR by citizens of Ukraine. It indicates that an urgent need to achieve maximum compliance of Ukrainian legislation with European standards in the field of human rights and prevent their violations still remains. This, in its turn, will help to reduce the number of appeals to the ECtHR. In particular, the Law of Ukraine 'On Enforcement of Decisions and Application of the Practice of the European Court of Human Rights' in regard to payment and reimbursement, which currently do not correspond to the European requirements, and therefore, deprive Ukrainian citizens of the right to timely and fully compensation delivered by the ECtHR. Taking into account the fact that, according to statistics, the total or average duration of implementation of general measures against Ukraine (amendments to legislation and judicial or administrative practice, institutional changes) is approximately seven and a half years, there is an urgent problem of ensuring compliance with the Convention at the national level. Among the systemic problems stated by the ECtHR practice towards Ukraine, it is also necessary to indicate the lack of budget financing in Ukraine aimed at the implementation of the ECtHR decisions. In order to overcome this problem, in our opinion, it is necessary to create an appropriate register, which will contain confirmed information about the funds necessary to ensure the enforcement of court decisions.

The implementation of ECtHR decisions by Ukraine is a key and extremely important issue for the country. First of all, we are talking about the issue of Ukraine's international legal

45 Novelties of Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms <https://ukrainepravo.com/international_law/european_court_of_human_rights/novely-protokolu-16-do-konventsiyi-pro-zakhyst-prav-lyudyny-i> accessed 25 January 2021.

responsibility, its obligations from the point of position of international law, and the ability to comply with its obligations in relations with international partners and the Council of Europe. Following the European integration course, Ukraine should take more responsibility for the implementation of decisions of international organisations and take the ECtHR proceedings as a basis.

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