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THE NATURE OF DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THEIR SIGNIFICANCE AS SOURCES OF LAW

Денис Чижов. ПРИРОДА РІШЕНЬ ЄВРОПЕЙСЬКОГО СУДУ З ПРАВ ЛЮДИНИ ТА ЇХ ЗНАЧЕННЯ ЯК ДЖЕРЕЛА ПРАВА. Стаття присвячена дослідженню природи рішень Європейського суду з прав людини та їх значенню як джерела права в контексті України. Практика Європейського Суду з прав людини встановлює нові норми та правила, які можуть відрізнятися від національних цивільних регуляцій і доповнювати їх. Ця практика, як і Конвенція про захист прав людини та основних свобод, розглядається як важливий джерело цивільного права і має обов'язковий характер для національних правових систем. В результаті, вона стає невід'ємною частиною національного цивільного законодавства, або, точніше, її «живим організмом». Діяльність Європейського суду відображає в собі не лише європейський правовий досвід, але також впливає на саму еволюцію законодавства країн-учасниць Конвенції.

Особлива увага приділяється аналізу того, як судова практика Європейського суду уособлюється та використовується в національному законодавстві України і як інші вчені юристи сприймають цей вплив. Юридична специфіка рішень Європейського суду з прав людини привертає увагу багатьох вчених юристів. Все це пов'язано з його унікальною роллю як наднаціонального юрисдикційного органу, маючи виключне право тлумачити та застосовувати Конвенцію про захист прав людини і основоположних свобод, а також з урахуванням особливостей правових систем країн-членів Ради Європи, де право поєднує як континентальний, так і англо-американський типи правових систем.

З урахуванням особливого статусу Європейського суду з прав людини, у вітчизняній юридичній науці існують обговорення щодо взаємодії національного законодавства та прецедентів Суду, з особливим акцентом на визначенні їх юридичної природи. Важливим питанням є можливість розглядати рішення Європейського суду з прав людини як прецеденти і можливість впровадження прецедентного права в Україні.

Ключові слова: *права людини, джерела права, правозастосування, юридична природа, Європейський суд з прав людини, національний правопорядок.*

Relevance of the study. Respect for and effective enforcement of human rights and freedoms are integral elements of a rule-of-law and democratic state. The issue of the legal nature of the judgments of the European Court of Human Rights (hereinafter – the Court, ECHR) has been and remains one of the most controversial in legal science. Neither the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols nor the Rules of Court provide a clear answer to the question of the nature of the judgments issued by the Court.

Recent publications review. The issue of the role of ECHR judgments has been studied by such scholars as: T. Slinko, K. Ismaylov, O. Klymovych, S. Shevchuk, V. Paliuk, P. Rabinovych, Y. Zaitsev, M. Kozyubra, N. Blazhkivska.

For instance, the special attention of scholars to the legal nature of the Court's judgments is related to the specific role of the Court as a supranational jurisdictional body with the exclusive right to interpret and apply the Convention for the Protection of Human Rights

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and Fundamental Freedoms, as well as to the peculiarities of the legal systems of the Council of Europe member states, whose law combines continental and Anglo-Saxon types of legal systems.

The article's objective is to study the nature of decisions of the European Court of Human rights and their significance as sources of law.

Discussion. In order to understand the essence and nature of the judgments of the European Court of Human Rights, it is necessary to first of all understand the status of this supranational justice body itself. The European Court of Human Rights is an international body that, under the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention), may consider applications submitted by individuals complaining of violations of their rights. The Convention is an international treaty under which most European states have undertaken to respect human rights and fundamental freedoms. These rights are guaranteed both by the Convention itself and by its protocols (Protocols No. 1, 4, 6, 7, 12 and 13), which have been ratified by the states parties to the Convention [1]. It carries out this task by reviewing and resolving specific cases accepted for proceedings on the basis of complaints filed by an individual, non-governmental organisation or group of individuals. The case law created by the Court, specifying human rights and defining their legal nature, is of the utmost importance in the direct application of the Convention's rules and principles. The nature of the judgments of the European Court of Human Rights and their significance as a source of law are not universal in any state. In this context, N. Blazhkivska identified the main factors that should be taken into account when analysing the nature of the judgments of the European Court of Human Rights as a source of law: the legal system of the state, the constitutional approach to the relationship between national and international law and the level of binding nature of the ECHR judgments for public authorities [2, p. 228].

It is worth to agree with the statement above, since a lot depends on the legal system in place within a particular state. The Romano-Germanic legal system defines the role of judicial practice in a completely different way than the Anglo-Saxon one. There are also certain peculiarities of perception of the European Court of Human Rights judgments as a source of law in a Muslim country. At the same time, the constitutions of different states define the place of international law in its relationship with national law in different ways. In some states, the rules of international law become part of the system of legislation or the system of law in the national state, while in others they are included in the legal system and, as a result, function in such states together with other elements that make up this system, along with them.

A distinct factor is also the national legal order, which may define differently the place and role of different bodies of the state, and therefore the binding effect of ECHR judgments on the state as a whole may be differently specified in relation to the legislative, executive or judicial branches. Ukraine belongs to the Romano-Germanic legal family, where the main source of law is a legal act, and judicial practice is not formally recognised as a source of law, but the use of judgments of the European Court of Human Rights as a source of law is becoming increasingly common. Ukraine, by ratifying the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the ECHR) in 1997, recognised the jurisdiction of the European Court of Human Rights on all matters relating to the interpretation and application of this Convention. As noted by M. Kozyubra, this event marked a fundamentally new historical stage for the national legal system in the development of the European legal space and organisation of internal life according to its inherent standards [3, p. 4]. However, the issue of recognition of ECHR judgments as a source of law in Ukraine has not been unambiguously resolved to this day.

A number of scholars, in particular, Y. Zaitsev [4] and P. Rabinovych [5], characterise the ECHR judgments in the context of the doctrinal vision inherent in the states of the Romano-Germanic legal family, where judicial practice is not recognised as a source of law, i.e., the ECHR judgments should not be perceived as sources of law. The authors substantiate their thesis with the fact that the ECHR does not establish legal grounds for granting the ECHR judgments the status of precedent in the classical sense, in particular, as in English law. On the other hand, S. Shevchuk and V. Paliuk [6, p. 235] hold the opposite view and believe that the ECHR judgments are precedents. Thus, S. Shevchuk noted that the ECHR judgments are normative in nature, are adopted in the process of resolving specific cases and are related to their actual circumstances. Nevertheless, in his opinion, the CCU's practice should be harmonised with the ECHR's practice, since democracy is based on fundamental values, rights

and freedoms, and the ECHR's judgments contain a powerful practical and methodological potential for the correct application of the ECHR. He also expressed the reasonable opinion that the Constitution of Ukraine has virtually duplicated almost all the rights enshrined in the ECHR, but national practice often does not correspond to the interpretation given by the European Court of Human Rights to the provisions of the European Convention. At the same time, the binding nature of European case law for Ukraine stems from the principle of "hierarchy of jurisdiction" – the European Court of Human Rights has the highest jurisdiction in the field of judicial protection of human rights and freedoms, which directly follows from part four of Article 55 of the Basic Law, despite the fact that the activities of the ECHR are complementary, since the main burden of this protection should be borne by national jurisdictional bodies [7, p. 128]. Other views are held by O. Klymovych, who believes that by its nature it is an official interpretation of the ECHR within a particular case, and the source of law in this case will be the result of the interpretation contained in the reasoning part of the court decision [8, p.139].

Contradicting the above, K. Ismailov holds a different opinion and argues that it is the ECHR norms that are the source of law, and the decisions of the European Court of Human Rights can only be called a source of its interpretation [9, p.77].

In order to form one's own point of view among the above pluralism of scholars' views on the nature of the ECHR judgments, one should compare not only doctrinal works, but also current legislation and existing law enforcement practice.

Thus, in accordance with the provisions of part four of Article 55 of the Constitution of Ukraine, the European Court of Human Rights can be considered an international judicial institution to which anyone who has exhausted all legal remedies guaranteed by domestic law in Ukraine can apply for the protection of rights and freedoms.

At the same time, Article 129 of the Constitution of Ukraine (as amended by the Law of 02 June 2016) provides that judges, when rendering decisions, should be guided by the rule of law, and not by the law, as in the previous version. In addition, we note that Article 46 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 17 of the Law of Ukraine "On the Execution of Judgments and Application of the Case Law of the European Court of Human Rights" provide for the obligation of Ukrainian courts to apply the Convention for the Protection of Human Rights and Fundamental Freedoms and the case law of the European Court of Human Rights as a source of law when considering cases. The Constitutional Court of Ukraine is no exception, as it first used the ECHR case law in its decision-making in a case on the death penalty back in 1999. Since then, when formulating its legal positions, the Constitutional Court of Ukraine has increasingly referred both directly to the ECHR and to the ECHR judgments as a source of law in search of additional justification. A reasonable opinion on this issue was expressed by T. Slinko that in many cases, the decisions of the Constitutional Court of Ukraine in matters of interpretation and developed legal positions guide the legislator, courts, and citizens in relation to the application of the ECHR and the ECHR case law in improving national legislation, resolving specific cases, and defending their rights [10, p. 597]. The Constitutional Court of Ukraine constantly uses the ECHR judgments to formulate its own legal positions, after which they actually become a substantive element of the reasoning part of its judgments. Given the above, it can be concluded that the ECHR judgments are a source of law in Ukraine and directly of the constitutional law of Ukraine.

The nature of the Court's judgments is assessed ambiguously: on the one hand, they are precedents, on the other – acts of interpretation, and they can also be considered as law enforcement acts. In our opinion, it is incorrect to classify these judgments as acts of interpretation, despite the fact that virtually every judgment of the Court contains an interpretation of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols. Indeed, it can be said that the Court provides a normative (delegated) interpretation of the Convention norms, but since it is given within the framework of a particular case and is not the purpose of the judgment, it should still be considered a precedent. By applying and interpreting the Convention in a particular case, in particular circumstances and in a specific individual (or inter-state) application, the Court creates certain normative guidelines in the form of its legal positions (legal provisions, legal standards). They are the ratio decidendi, i.e. the essence of the judgment, which serve as a guide for further law enforcement and which eliminate uncertainty in specific situations.

The majority of domestic scholars, in particular, O. Klymovych, P. Rabinovych,

O. Solovyov, D. Suprun, L. Tymchenko, and S. Fedyk, consider the Court's judgments as a legal act with a dual legal nature: law enforcement and law interpretation. Some of them place greater emphasis on the characterisation of such judgments as acts of law interpretation, while others focus on their law enforcement nature.

From the point of view of the general theory of law, the Court's judgments are indeed law enforcement acts, but they also combine certain properties of law interpretation acts. This is due to the fact that in the course of law enforcement activities, the relevant provisions of the Convention are explained in terms of their application to a particular life situation. When an act of application is given a written legal form, it often formalises the rules for understanding the content of the relevant provision of the Convention, i.e. those rules of interpretation of the Court which give legal force to the act of application of this provision. At the same time, it can hardly be argued that any aspect of the dual status of the Court's judgments is dominant, since Article 32 of the Convention establishes the extension of the Court's jurisdiction to all matters of interpretation and application of the Convention. However, in practice, the Court's powers to interpret the Convention are gaining more weight in terms of its legal positions and the process of "development of the Convention".

The Court's judgments have all the features of law enforcement acts. Firstly, the Court is a competent authorised body (Article 32 of the Convention). Secondly, the judgments are of a public authority nature, they are enforced by an intergovernmental institution – the Council of Europe, which, through a specially authorised body (the Committee of Ministers), monitors their implementation by the respondent state in the case and has the right to impose legal and political sanctions on the latter for failure to comply with such acts. Thirdly, the Court's judgments as law enforcement acts contain an individual, formally binding rule of conduct, which consists in recognising the presence or absence of a violation of the Convention and, depending on the consequences of the violation, in awarding just satisfaction. Fourthly, the binding effect of the Court's judgments is always intended to be directed at personified subjects – the applicant and the respondent state. Although, as an option, by resorting to measures of a general nature, the state may take appropriate measures to avoid similar violations against other subjects in the future. Fifthly, the Court's judgments regulate only specific cases of public life, so their legal effect is exhausted by the fact of implementation of an individual order. In other words, the Court's judgment in a particular case cannot be applied to another, even similar case "automatically", without proper justification of the Court's position in the new judgment, although it may refer to its previous judgments when making subsequent judgments in similar cases. Sixth, the Court's judgments are inherently direct. Seventh, they have a written legal form of expression and consist of three main parts: "Procedure", "Facts" and "Questions of Law". Eighthly, these judgments are a prerequisite for the proper implementation of the violated rights and freedoms provided for by the Convention [11, pp. 173-179].

The peculiarity of the Court's legal interpretation activity is that its results are contained in the external legal form of a law enforcement act – its decision. However, such a law enforcement act also has all the features of an interpretive legal act. Firstly, in accordance with Article 32 of the Convention, such a judgment is a legal act of a competent entity – the Court. Secondly, the interpretation of the Convention contained in the Court's judgment is formally binding on all subjects, since only the Court has the authority to carry out its official interpretation. Thirdly, the judgment contains rules for understanding the content of the Convention's provisions, which are rather abstract and are made concrete through the Court's interpretation. Fourthly, the Court's judgment has a written legal form of expression. Fifthly, such decisions have legal force, determined by the status of the subject of interpretation – the Court. Sixthly, the rule of understanding the content of the Convention provision contained in such a judgment does not go beyond it – at least declaratively (the Court's legal positions state that it cannot, using evolutionary interpretation, derive from such a provision "a right that was not included in the text before") [12]. Usually, the Court uses general wording and notes that a right, which is not literally written in the text of the Convention, follows from a certain rule in the light of the objectives of the Convention or explains the features of a certain concept contained in the Convention. In other words, on the one hand, the Court "develops" the provisions of the Convention, and on the other hand, it acknowledges that it does not go beyond the content of these provisions, although such limits are quite broad. Seventhly, the Court's judgments do not in themselves create new, amend or repeal existing rules of law. Eighth, the rules for understanding the content of such rules are valid only for the duration of

the Convention. Ninthly, the Court's judgments have no independent significance and are valid only in unity with its provisions [5, p. 141].

If we look at the Court's judgments not only from the point of view of the possibility of using them as sources of law in domestic law enforcement practice, but as an objective legal reality, we will see that such judgments in many countries receive the same understanding and perception as precedent. It is clear that we are talking about the countries of the Anglo-Saxon legal family, but in France and Germany, both have recently seen more and more cases of using the Court's judgments as a precedent in the practice of local courts. In their judgments, the courts do not explain their legal position, referring to the existing precedent established by the Court's judgment as an a priori generally accepted legal fact.

It should also be added that the precedent-setting nature of the Court's case law is also reflected in the fact that in resolving cases, the Court tends to generally follow the approaches it has taken in the past, unless it deems it necessary to change them. At the same time, the Court has repeatedly emphasized that it is not bound by its previous decisions and, indeed, changes its legal positions from time to time. This is justified, because although the possibility of changing case law does not contribute to legal certainty, it should be borne in mind that there is a dialectical contradiction between legal certainty and the development of law [13]. In general, it can be stated unequivocally that the Court is not bound by its own decisions.

The peculiarity of the functions of the Court's judgments is due to their multidimensional nature. Therefore, they combine some functions of law (since they contain normative provisions), functions of judicial acts (essentially law enforcement), and functions of interpretative acts. The functions of the Court's judgments should be considered to be the areas of legal influence of the legal acts adopted by the Court containing normative provisions on the legal system of the States Parties to the Convention, which reflect the role of the Court as an international justice body. Among the main functions of the Court's judgments are the following: interpretation of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto; formation of experience in the application of the Convention and the Protocols thereto, which is implemented directly in the process of consideration and resolution of cases on the merits; improvement of legislation and law enforcement practice; improvement of justice, which may be expressed in the form of changes in judicial practice, creation of opportunities for review of the case in case the Court finds violations of the Convention, in the formation of general approaches to national law enforcement practice and makes it possible to identify problems, contradictions and new trends in the development of legislation and law enforcement practice; influence on legal consciousness: the Court's judgments affect the perception of people (not only participants in the process, but also citizens of the Council of Europe member states in general) about law in general, human rights and their protection; interaction with the science of law and development of legal doctrine, which means that the Court develops new legal ideas in the course of its activities that allow a new look at a particular legal issue.

Thus, it can be reasonably argued that the legal nature of the Court's judgments is embodied in their functional load, and therefore it seems quite logical that they should be used in domestic law enforcement practice, including in court proceedings. However, such application should be based on clearly established procedures. For example, paragraph one of the Law of Ukraine "On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the First Protocol and Protocols No. 2, 4, 7 and 11 to the Convention" of 17 July 1997 states that "Ukraine fully recognizes on its territory the effect of Article 46 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 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 without the conclusion of a special agreement" [14]. However, this provision does not allow law enforcement agencies to use the Court's judgments as sources of law when implementing the measures set out in Article 13 of the Law of Ukraine "On the Execution of Judgments and Application of the Practice of the European Court of Human Rights", in particular, regarding changes to administrative and law enforcement practice on issues not regulated by the Convention, but whose imperfection or contradiction is directly indicated by the Court in its judgment.

At the same time, I would like to emphasize that the absence of general binding effect of the legal positions contained in the Court's judgments on national judicial systems, including the courts of the states against which such judgments were delivered, does not mean that such judgments themselves are not binding on these states.

European experts' assessment of the legal nature of the judgments of the European Court of Human Rights is also controversial. In its rulings and judgements, the Court has repeatedly emphasized that: "the Convention is not a static legal act, it is open to interpretation in the light of the present"; "the object and purpose of the Convention as a legal act ensuring the protection of human rights requires that its provisions be interpreted, i.e., their understanding in the legal consciousness of society evolves, and applied in such a way as to make its guarantees effective and real". This approach is known in the scientific community as "evolutionary interpretation". The evolutionary interpretation of the Convention by the Court's judges should be based not only on the "development of society", it cannot be subjective and arbitrary, nor can it be an abuse of law. In interpreting the European Convention on Human Rights, the Court cannot ignore other forms of international law. The Convention, firstly, is only one of numerous international treaties, and secondly, in addition to international treaties, there are other forms of international law, including generally recognized principles of international law and international customs, which, in our opinion, should be applied by judges in the process of systematic interpretation of the European Convention on Human Rights as one of the international treaties.

Conclusions. To summarize, we can say that the Court's judgments are, so to speak, of a mixed legal nature. On the one hand, they combine the features of law enforcement and interpretive legal acts, and on the other hand, they are the result of law enforcement specification. In any case, they are not the result of lawmaking. In terms of their law-regulatory function, these decisions are a cross between classical Anglo-Saxon precedent and continental law enforcement practice as a stable and consistent position of courts on certain law enforcement issues. These judgments contain legal positions that do not have the nature of legal norms, but are relatively binding for the European Court of Human Rights itself and become important for law-making of the participating states as a result of specification of the Convention. This gives rise to the term "law-concretizing precedents" to describe such decisions of the Court.

The Court's case-law contributes to a clear interpretation of the provisions of the Convention and its Protocols and serves as a source of dynamic and ongoing interpretation. This is achieved through the Court's consistent and sustained jurisprudence, which is in line with the inherently recognized case law or precedents of the Romano-Germanic legal system.

Thus, the legal nature of the Court's judgments can be defined, taking into account their role in legal regulation, as follows: these judgments can be considered as law-concretizing precedents, i.e. law-enforcement acts that interpret the provisions of the Convention through the legal provisions included in them. This is of a precedential nature for the Court itself and at the same time is of great importance for the formation of the legal systems of the States Parties to the Convention.

Conflict of Interest and other Ethics Statements

The author declares no conflict of interest.

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ABSTRACT

The article is devoted to the study of the nature of judgments of the European Court of Human Rights and their significance as a source of law in the context of Ukraine. The case law of the European Court of Human Rights establishes new rules and regulations that may differ from and supplement national civil regulations. This case law, as well as the Convention for the Protection of Human Rights

and Fundamental Freedoms, is considered an important source of civil law and is binding on national legal systems. As a result, it becomes an integral part of national civil law, or, more precisely, its "living organism". The activities of the European Court reflect not only the European legal experience, but also influence the very evolution of the legislation of the countries party to the Convention.

Particular attention is paid to the analysis of how the case law of the European Court is embodied and used in the national legislation of Ukraine and how other legal scholars perceive this influence. The legal specificity of the judgments of the European Court of Human Rights attracts the attention of many legal scholars. All this is due to its unique role as a supranational jurisdictional body with the exclusive right to interpret and apply the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as the specifics of the legal systems of the Council of Europe member states, where the law combines both continental and Anglo-American types of legal systems.

Taking into account the special status of the European Court of Human Rights, there are discussions in the national legal science on the interaction between national legislation and the Court's precedents, with a special emphasis on determining their legal nature. An important issue is the possibility of considering the judgments of the European Court of Human Rights as precedents and the possibility of implementing case law in Ukraine.

Keywords: *human rights, sources of law, law enforcement, legal nature, European Court of Human Rights, national legal order.*

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COMPARATIVE CHARACTERISTIC OF THE STATUS OF A REFUGEE AND A PERSON WHO HAS OBTAINED TEMPORARY PROTECTION IN THE CONTEXT OF ARMED AGGRESSION BY THE RUSSIAN FEDERATION (EUROPEAN EXPERIENCE)

Олена Остапенко. ПОРІВНЯЛЬНА ХАРАКТЕРИСТИКА СТАТУСУ БІЖЕНЦЯ ТА ОСОБИ, ЩО ОТРИМАЛА ТИМЧАСОВИЙ ЗАХИСТ В УМОВАХ ЗБРОЙНОЇ АГРЕСІЇ З БОКУ РОСІЙСЬКОЇ ФЕДЕРАЦІЇ (ЄВРОПЕЙСЬКИЙ ДОСВІД). У статті досліджуються питання співвідношення правового статусу біженця та особи, яка набуває тимчасовий захист, їх особливості шляхом порівняння інститутів притулку та тимчасового захисту. Як критерії порівняння, обрано правову основу, суб'єктний склад, підстави набуття відповідного статусу, обсяг прав та обов'язків.

Правове регулювання тимчасового захисту здійснюється Директивою 2001/55/ЄС про мінімальні стандарти для надання тимчасового захисту у разі масового напливу переміщених осіб та про заходи, що сприяють збалансованості зусиль між державами-членами щодо прийому таких осіб та відповідальності за наслідки такого прийому та Імплементаційне рішення Ради Європи 2022/382 від 4 березня 2022 року. Іншими джерелами регулюється статус біженців та інститут притулку. Це Декларація про територіальний притулок, ухвалено резолюцією 2312 (XXII) Генеральної Асамблеї ООН від 14 грудня 1967 року, Конвенція про статус біженців від 28 липня 1951 року, Протокол щодо статусу біженців від 31 січня 1967 року та Конвенція, що визначає державу, яка відповідає за розгляд заяв про надання притулку, що подані в одній з держав-членів Європейських Співтовариств (Дублінська конвенція) від 15 червня 1990 року.

Встановлено, що для набуття статусу біженця особа повинна відповідати наступним ознакам: мати обґрунтовані побоювання стати жертвою переслідувань за ознакою расової належності, релігії, громадянства, належності до певної соціальної групи чи політичних поглядів;

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