

## TO THE ISSUE OF CRIMINAL RESPONSIBILITY FOR VIOLATIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS DECISIONS IN UKRAINE

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**Abstract** The article is devoted to the criminal law aspect of using the judgments of the European Court of Human Rights in Ukrainian legislation and law enforcement practice. The problem of criminal liability for non-enforcement of judgments of the European Court of Human Rights has been investigated and as the result the conclusion has been made about the necessity to amend the legislative norm of the Criminal Code of Ukraine establishing criminal liability for the indicated act.

**Key words:** *criminal law, decisions of the European Court of Human Rights, non-enforcement of a court decision, criminal liability.*

### Introduction

The statutory provision of Article 55 of the Constitution of Ukraine on the right of everyone "to apply for the protection of their rights and freedoms to the relevant international judicial institutions or to the relevant bodies of international organizations where Ukraine is a party" [9] is of urgent issue nowadays as Ukraine wants to meet the international and European standards in the field of human rights and freedoms. The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention) [2], ratified by Ukraine July, 17 in 1997, not only proclaimed fundamental rights and freedoms, but also developed a special legal mechanism for their protection: the European Court of Human Rights.

In December 2015, the Council of Europe's Steering Committee on Human Rights published a report on the longer-term future of the system of the European Convention on Human Rights ("the Convention"). There were two challenges which particularly struck lawyers: firstly, prolonged non-implementation of a number of judgments of the European Court of Human Rights and secondly, direct attacks on the Court's authority. It is difficult to overestimate the outstanding contribution of the Strasbourg Court to the protection of human rights in Europe. This has been acknowledged during the reform process (High Level Izmir-Brighton-Brussels conference declaration). The fact that so many Europeans (among them - Ukrainians) turn to the Strasbourg Court for redress reflects the high level of trust that they place in the Convention system. Nevertheless, the participating States must ensure the effectiveness of the enforcement of Court decisions. Prolonged non-implementation of the judgments of the Court is a challenge to the Court's authority and thus to the Convention system as a whole. While the 2015 Annual Report of the Committee of Ministers on the execution of the Court's judgments shows that a new record number of cases were closed in 2015, there is a continued increase of cases pending for more than five years. In 2011 these cases accounted for 20% of the total number of cases, while by the end of 2015 that figure had risen to 55%. The number of 'leading' cases pending, those indicating structural problems, has also risen steeply from 278 cases in 2011 to 685 cases in 2015. The average time it takes to close a case is generally around 4 years, however in some States that figure

is much higher: around 10, 8 and 7 years in cases concerning Russia, Moldova and Ukraine, respectively. Indeed, in its eighth report on the implementation of Court judgments, the Legal and Human Rights Committee of the Council of Europe's Parliamentary Assembly concluded that there was a rising number of judgments concerning complex or structural problems, so-called 'leading' cases, that have not been implemented for more than ten years. It expressed its concern about the approximately 11,000 non-implemented judgments pending before the Committee of Ministers. Prolonged non-implementation is problematic, even if complex problems do take time to resolve. Reforms can legitimately take time to design and implement. Nevertheless, the rule of law requires that all judgments should be implemented promptly, fully and effectively. Prompt execution of domestic court decisions is one of the hallmarks of a democratic society. The same should apply for execution of international judgments. State parties to the Convention have accepted the creation of a mechanism which has the competence to examine and decide on the way they ensure Convention rights and freedoms within their jurisdiction. That mechanism is the Strasbourg Court. States have also accepted the Court's ability not merely to apply, but to interpret the Convention. According to Article 46 of the Convention, contracting parties must abide by the final judgment of the Court in any case to which they are parties. Article 46 (1) is an unequivocal legal obligation. Article 1 of the Convention does not exclude any part of a member state's jurisdiction, including the Constitution, from scrutiny under the Convention. Possible conflicts between national law and the Court's case-law cannot be settled through refusing to execute a judgment of the Court. That would be unacceptable. Moreover, a State is bound under Article 26 of the Vienna Convention on the Law on Treaties to respect ratified international agreements and pursuant to Article 27 it cannot invoke the provisions of its internal law as justification for its failure to perform a treaty, including the European Convention on Human Rights.

The authority and the efficiency of the human rights protection system based on the Convention is undermined where national authorities chose not to fully comply with judgments of the Court. Member states can fully see what their peers are doing during the Committee of Ministers' meetings. In recent years direct challenges to the authority of the Court within a handful of member states have also become more explicit and vocal. They have gone beyond prolonged non-implementation of a few of the Court's judgments. They are of particular concern because the Convention system's integrity and legitimacy is at stake. The binding nature of the European Court of Human Rights decisions in criminal law of Ukraine consists of the following: firstly, according to Article 1 of the Convention, Ukraine has undertaken the responsibility to ensure the rights and freedoms of every person under its jurisdiction, and secondly, according to Article 32 of the Convention, the decisions of the European Court of Human Rights contain an official interpretation of the conventions that are considered to be mandatory in criminal law.

The influence of the decisions of the European Court of Human Rights on Ukrainian criminal law is also testified by the fact that the state, against which a decision has been made of violating the provisions of the Convention, takes measures to eliminate such violations by amending the criminal legislation and law enforcement practice. The examples of such practice can be traced in the amendments of the penal legislations of England,

Belgium, Italy, France, Switzerland and other European states in accordance with the decisions of the European Court of Human Rights.

The problems of criminal liability for non-compliance with decisions of the European Court have been studied by many scholars. The most significant works have been done by V.N. Bibilo, T.N. Dobrovolskaya, O.V. Constantnyi, V.N. Kudryavtsev, M.V. Kuchin, A.V. Naumov, A.O. Selivanov, N.S. Tagantsev, M.D. Shargorodsky and others. The normative aspect of the principles of justice testifies that in the objective form they are the norms of law, the observance of which is obligatory and provided by the power of the state. In addition, these principles can be expressed in a separate norm, and "flow" from several legal norms, each of which formulates only a separate component of a specific principle. On this basis, T.N. Dobrovolskaya notes that the principles of justice can receive dual consolidation [3]. An example of such normative statement is precisely the principle of binding judgments enshrined in Article 124 of the Constitution of Ukraine, which declares that "judicial decisions ... are mandatory for execution throughout the territory of Ukraine" and Article 129 of the Constitution of Ukraine that makes the court decisions binding, according to the basic principles of the court proceedings. The decision of the Plenum of the Supreme Court of Ukraine of December 29, 1976, No. 11 "On the Judgment" [8] draws the attention of the courts to the fact that the court decision is the most important act of justice designed to ensure the protection of human rights and freedoms guaranteed by the Constitution, as well as order and the implementation of the principle of the supremacy of law. No principle can receive its reflection only in one rule of law, even if it is a norm-principle. Only a set of norms can express each of the principles of justice [1].

Taking into consideration all mentioned above, we can state that the obligation is included in the content of the legal force of the decision and at the same time it is an independent property that manifests itself in all the properties of the legal validity of the judicial decision of the European Court of Human Rights. Obligation of a court decision ensures its promptness, exclusiveness, indisputability, undeniability, prejudicialness, immutability.

By interpreting the Convention, the European Court of Human Rights reveals the content of the human rights and freedoms set in the Convention and its protocols, while the Ukrainian Criminal Code (hereinafter referred to as the "UCC") ensures the protection of human rights and freedoms, thus defining the features of crimes that encroach on the rights and freedoms of a man and citizen. The judgments of the European Court of Human Rights are binding on the entities applying the Convention in the criminal law of Ukraine. One of the manifestations of the impact of European Court of Human Rights decisions on Ukrainian criminal law is the recognition of court decisions as a source of criminal law.

According to Article 17 of the Law of Ukraine "On the implementation of decisions and application of the European Court of Human Rights practice" dated February 23, 2006 [10] while considering cases, courts are bound to apply the Convention and the European Court of Justice as a source of law. Consequently, this means that the practice of the European Court has primarily legal significance and is a direct regulator of public relations. In addition, for its proper implementation, it is not necessary to expect introducing of other normative legal acts, and judicial authorities can not refuse their application with reference to the necessity of adoption of some additional "specifying" rules of law.

O. Konstantynov states that complete decision implementation of the European Court of Justice should be based on ideological and legal value [5] Indeed, under the implementation of judgment of the European Court of Justice, one should understand not only the payment of compensation, but also the State adoption of individual measures in order to eliminate a specific violation imposed by the European Court of Justice as well as the general measures aimed at eliminating the grounds for the receipt of the European Court of the same statements against Ukraine in the future prospectives [6].

The practice of most European countries shows that improvement of the situation with systematic non-enforcement of court decisions by the state is possible only in case when the country's judicial system works more efficiently. Only under such conditions, citizens will have less grounds to appeal for their interests to the European Court of Human Rights.

According to Article 382 of the UCC intentional non-execution of a judgment, decision, decree, court rulings which have become legally binding, or impediment to their execution - shall be punishable by a fine of five hundred to one thousand non-taxable minimum of citizen incomes or imprisonment for a term up to three years; the same actions committed by an official - shall be punishable by a fine of seven hundred and fifty to one thousand non-taxable minimum incomes, or imprisonment for a term up to five years, with the deprivation of the right to occupy certain posts or engage in certain activities for a term up to three years; actions foreseen by part one or two of this Article, committed by an official who has responsible or particularly responsible post, or by a person previously convicted for a crime envisaged by this Article or if they caused significant damage to the rights and freedoms of citizens, state, public interests or interests of legal entity - is punishable by imprisonment for a term of three to eight years with the deprivation of the right to occupy certain posts or engage in certain activities for a term up to three years; intentional non-performance by the official of the European Court of Human Rights decision - is punishable by imprisonment for a term of three to eight years, with the deprivation of the right to occupy certain posts or engage in certain activities for a term up to three years.

The analysis of the sanctions chapter 1-3 Article 382 of the UCC testifies that these crimes are considered by the legislator as acts of a small or medium gravity, as well as grave crimes. It allows a legislator to apply punishments which are alternatives to deprivation of liberty: to fine for a great variety of violations, to restrict liberty and develop not single but alternative sanctions that give the opportunity to choose the most appropriate punishment, taking into account the specific features of the crime and the person who committed it. However, the question arises: why is a punishment for a deliberate non-compliance with the European Court of Human Rights decisions by an official more severe than a deliberate nonfulfillment of a sentence, decree or court orders? After all, the principle of binding judgments of national courts is one of the constitutional principles of legal proceedings, which is set in Articles 124, 129 of the Constitution of Ukraine and has the highest legal force. Moreover, the legal consequences of non-enforcement of decisions of national courts for individuals and legal entities are the same as in the case of non-enforcement of judgments of the European Court of Human Rights.

One of the forms of implementation of court decisions is compulsory enforcement which is applied in the case when the obligated person avoids the voluntary execution of the decision.

According to Y.I. Grinko, the purpose of legal proceedings will be reached only when the court decision is executed, and execution will be completed strictly in accordance with the law and the content of the decision [4]. I.D. Prytyka points out that "the effectiveness of the judicial system is determined on condition that the court decision is executed" [7].

### **Conclusions**

Based on the comprehensive study of the significance of the decisions of the European Court of Human Rights in the norms of the General and Special Parts of the UCC the following conclusions have been made:

1. Recognition of the jurisdiction of the European Court of Human Rights by Ukraine means, firstly, the recognition in the national criminal law of the binding force of the Court's decisions, and secondly, the Court's ruling applies to all States parties to the Convention for the Protection of Human Rights and Fundamental Freedoms; thirdly, the Court is empowered to determine the extent of the rights and obligations that are entrusted to the State.
2. The decisions of the European Court of Human Rights are binding on other States parties to the Convention for the Protection of Human Rights and Fundamental Freedoms, which have the same violations. States that are the parties of the Convention for the Protection of Human Rights and Fundamental Freedoms responsible for their international obligation implementations, take measures by amending the criminal law that is not in conformity with the Convention and the Court's ruling, without waiting for the relevant reaction of the European Court of Human Rights.
3. The complete analysis of the practice of the European Court of Human Rights has shown that its decisions are of a precedent nature, since under similar circumstances, the Court, by a general rule, makes decisions similar to those having been already considered. The principles and approaches of the European Court of Human Rights specified in the judgment against a member state of the Council of Europe are applied by analogy in cases against other countries, including those who joined the Convention after the decision had been made.
4. Based on the principle of binding judgments of the European Court of Human Rights in national criminal law, it should be noted that the Court's decisions are normative. According to Article 32 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the jurisdiction of the European Court of Human Rights extends to all matters specified in the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols.
5. Taking into account all mentioned above, we propose the disposition of the first, second and third parts of Article 382 of the UCC in the following way. "Article 382. Failure to comply with a court decision:
  - Deliberate non-execution of a judgment, decision, decree, court ruling, which became legally binding, or impediment to their execution shall be punishable by a fine of five hundred to one thousand non-taxable minimum incomes, or imprisonment for a term up to three years.
  - The same actions committed by an official shall be punishable by a fine of 700 to one thousand non-taxable minimum incomes, or imprisonment for a term up to five years,

with the deprivation of the right to occupy certain posts or engage in certain activities for a term up to three years.

- The same actions committed by an official who holds a responsible or particularly responsible post or by a person previously convicted for a crime envisaged by this article or if they caused significant damage to the rights and freedoms of citizens, public or public interests or legal interests protected by law as well as deliberate failure by the official to comply with the judgment of the European Court of Human Rights, - shall be punishable by restraint of liberty for a term up to five years or by deprivation of liberty for the same term, with the deprivation of the right to occupy certain posts or engage in certain activities for a term up to three years. "

Part 4 of Article 382 of the UCC is proposed to be excluded from Article 38 of UCC.

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